



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 032 366 544



HARVARD LAW LIBRARY.

Received *Oct 17. 1904.*



c #

A TREATISE
ON THE
LAW AND PRACTICE
OF
INJUNCTIONS.

BY
WILLIAM WILLIAMSON KERR,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

FOURTH EDITION.

BY
EDGAR PERCY HEWITT, LL.D.,
OF LINCOLN'S INN, BARRISTER-AT-LAW,

ASSISTED BY
SYDNEY E. WILLIAMS,
OF LINCOLN'S INN, BARRISTER-AT-LAW,

o

AND
JOHN MELVIN PATERSON, M.A., LL.M.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:
SWEET & MAXWELL, LIMITED,
3, CHANCERY LANE, W.C.
Law Publishers.
1908.

5
UK
971
KER

121

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

Rec. Oct. 17, 1904

PREFACE.

FIFTEEN years have elapsed since the last edition of this work appeared, during which time there have been numerous decisions relating to the subject dealt with. In the present edition it has been thought desirable, whilst retaining for the most part the original arrangement, to thoroughly revise the whole work, and to entirely re-write some portions of it.

A large amount of new matter has been introduced, but it has been found possible to do this, and also to enlarge the Index, without increasing the size of the book, a great deal of what was obsolete or unnecessary in the last edition having been omitted.

The enlarged Index will, it is hoped, render reference to the text easier, and add to the usefulness of the present edition.

I have been greatly assisted by Mr. J. M. Paterson and Mr. Sydney Williams in the preparation of this edition. The chapter on Patents, which has been entirely re-written, and the extensive alterations in the chapters on Copyright and Trade-marks are practically the work of Mr. Williams, who kindly took this labour off my hands. I am also indebted to him for preparing the Index and the Table of Cases.

E. P. H.

April, 1903.

CONTENTS.

	PAGE
CHAPTER I.	
INJUNCTIONS IN GENERAL	1
CHAPTER II.	
THE NATURE AND LIMITS OF THE JURISDICTION OF THE HIGH COURT OF JUSTICE BY INJUNCTION	3
CHAPTER III.	
INJUNCTIONS AGAINST THE VIOLATION OF COMMON LAW RIGHTS .	12
Section 1.—The protection of Legal Rights to Property pending litigation	12
Section 2.—Perpetual Injunctions. Mandatory Injunctions .	25
CHAPTER IV.	
INJUNCTIONS AGAINST WASTE	35
Section 1.—Principles on which the Court acts in restraining waste	35
Section 2.—Legal Waste	37
Section 3.—Persons for and against whom Injunctions are granted	54
Section 4.—Equitable Waste	65
Section 5.—Property in Timber cut by the order of the Court, or accidentally severed, &c. Account . . .	75
Section 6.—Recent Statutes affecting Waste	79
CHAPTER V.	
INJUNCTIONS AGAINST TRESPASS	81

CHAPTER VI.

INJUNCTIONS AGAINST NUISANCE	117
Section 1.—Principles on which the Court acts in restraining nuisance	117
Section 2.—Nuisances to Dwelling Houses and Houses of Business	140
Section 3.—Nuisances to Support	163
Section 4.—Nuisances relating to Water	178
Section 5.—Purprestures. Nuisance to Navigable Tidal Waters	206
Section 6.—Nuisances to Rights of Way	210
Section 7.—Nuisances to Highways	226
Section 8.—Nuisances to Ferries	235
Section 9.—Nuisances to Market	237
Section 10.—Nuisances connected with Trade Disputes	241
Section 11.—Various Nuisances	244

CHAPTER VII.

INJUNCTIONS AGAINST THE INFRINGEMENT OF PATENTS	246
Section 1.—Principles on which the Court restrains the Infringement of Patents	246
Section 2.—What is an Infringement	255
Section 3.—Interlocutory Relief	262
Section 4.—Practice on Interlocutory Injunctions	265
Section 5.—Perpetual Injunctions	268

CHAPTER VIII.

INJUNCTIONS AGAINST THE INFRINGEMENT OF COPYRIGHT . . .	275
Section 1.—Principles on which the Court restrains the Infringe- ment of Copyright	275
Section 2.—Copyright in general	283
Section 3.—Literary Copyright	284
Section 4.—Dramatical and Musical Copyright	303
Section 5.—Copyright in Prints, Engravings, Sculptures, Photographs, &c., &c.	308
Section 6.—Copyright in Paintings, Drawings, and Photographs	311
Section 7.—Copyright in Sculpture and Busts	315

	PAGE
Section 8.—Copyright in Designs	317
Section 9.—International Copyright	321
Section 10.—Account, Costs, &c. &c.	325

CHAPTER IX.

INJUNCTIONS TO RESTRAIN THE PIRACY OF TRADE MARKS	328
---	-----

CHAPTER X.

INJUNCTIONS IN RESPECT OF COVENANTS OR AGREEMENTS	356
Section 1.—Injunctions against breach of Covenant or Agreement	356
Section 2.—Injunctions in Aid of Specific Performance	417

CHAPTER XI.

INJUNCTIONS AGAINST THE DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS, PAPERS, SECRETS, &c.	420
---	-----

CHAPTER XII.

INJUNCTIONS AGAINST THE PUBLICATION OF MANUSCRIPTS, LETTERS, AND OTHER UNPUBLISHED MATTER	427
---	-----

CHAPTER XIII.

INJUNCTIONS AGAINST THE PUBLICATION OF A LIBEL AND AGAINST SLANDER OF TITLE	436
---	-----

CHAPTER XIV.

INJUNCTIONS AGAINST EXECUTORS	444
---	-----

CHAPTER XV.

INJUNCTIONS BETWEEN PARTNERS	446
--	-----

CHAPTER XVI.

INJUNCTIONS AGAINST TRUSTEES	456
--	-----

CHAPTER XVII.

INJUNCTIONS BETWEEN MORTGAGOR AND MORTGAGEE	462
---	-----

	PAGE
CHAPTER XVIII.	
INJUNCTIONS AGAINST COMPANIES	469
CHAPTER XIX.	
INJUNCTIONS AGAINST CLUBS, SOCIETIES, &C., &C.	500
CHAPTER XX.	
INJUNCTIONS AGAINST CORPORATIONS	506
CHAPTER XXI.	
ORDERS RESTRAINING PROCEEDINGS	517
CHAPTER XXII.	
INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE	529
CHAPTER XXIII.	
PRACTICE	550
Section 1.—In what manner Injunctions are obtained	550
Section 2.—Dissolution of Injunctions	584
Section 3.—Effect of Certain Proceedings on Injunctions	589
Section 4.—Continuing or granting Injunctions at the Hearing.	590
Section 5.—Inquiry as to Damages where Injunction dissolved.	591
Section 6.—Consequences of the breach of an Injunction or Restraining Order	593
—————	
INDEX	603

TABLE OF CASES.

- Aas v. Benham*, 448
Abergavenny Commrs. v. Straker, 238
Abernethy v. Hutchinson, 429, 435
Abraham v. Bubb, 57, 67
 — *v. Mayor of London*, 91
Abson v. Fenton, 218
Accidental Insurance Co. v. Accidental Disease, &c., Co., 835
Ackroyd v. Smith, 122
Acraman v. Bristol Dock Co., 556
Actien Gesellschaft v. Temler, 248, 265, 266
Acton v. Blundell, 194
 — *v. Woodgate*, 458
Adair v. Young, 14, 249
Adams v. Battey, 277
 — *v. Clementson*, 318
 — *v. North British Rly.*, 248
 — *v. London and Blackwall Rly.*, 92
Adley v. Whitstable Co., 477
Aerators, Lim., v. Tollitt, 498
Aflalo v. Lawrence, 801
Agar's case, 88
Agar v. P. and O. Steam, &c., Co., 290, 300
Ainsworth v. Bentley, 15, 281, 371
 — *v. Wilding*, 421, 588
Aitken v. Dunbar, 575
Ajello v. Worsley, 244
Albert, Prince, v. Strange, 299, 826, 420, 427—9
Aldam, Re, 79
Alder v. Fouracre, 449
Aldin v. Latimer, 154, 155
Aldis v. Fraser, 88
Aldred's case, 144, 154, 155, 157, 201
Aldridge v. Aldridge, 540
Alexander v. Automatic Telephone Co., 494, 497
 — *v. Henry*, 353
 — *v. M'Kenzie*, 290
Allan v. Gomme, 216
Allard v. Jones, 556
Allen v. Flood, 194, 248
 — *v. Martin*, 82, 84
Allen v. Ormond, 224
 — *v. Seckham*, 82, 148
 — *v. Taylor*, 146, 379
Allgood v. Merrybent, &c., Rly., 108, 418
Allport v. Securities Co., 34
Allsopp v. Wheatcroft, 376, 377
Almada and Tiritto Co., Re, 484
Altmann v. Royal Aquarium, 396
Amalgamated Syndicates, Lim., 488
American Braided Wire Co. v. Thomson, 31
American Tobacco Co. v. Guest, 29, 272, 350, 573
Amhurst v. Dawling, 465
Amory v. Brown, 250
Amyott, Ex parte, 581
Anderson v. Anderson, 458
 — *v. Kemshead*, 519
 — *v. Midland Rly.*, 478
 — *v. Oppenheimer*, 197, 198
 — *v. Salmon*, 502
 — *v. Wallace*, 458
Anderson's Trade Mark, Re, 381
Anderton v. Yates, 562
Andrews v. Gas Meter Co., 489
Angerstein v. Hunt, 44, 595
Angier v. May, 567
Anglo-Danubian, &c., Co. v. Rogerson, 568
Anglo-Universal Bank v. Baragnon, 493
Anthony Birrell, Pearce and Co., Re, 560
Apollinaris Co. v. Herrfeldt, 348, 350
 — *Co.'s Trade Mark*, 563
 — *Co. v. Wilson*, 342
Arbenz, Re, 386
Arcedeckne v. Kelk, 148
Archbold v. Scully, 19
Archer v. Marsh, 377, 388
Ardley v. Guardians of St. Pancras, 82, 84
Arkwright v. Gell, 187, 191
 — *v. Gryles*, 529
Armstrong, Re, 600
 — *v. Armstrong*, 520

- Arnold *v.* Baker, 280
 — *v.* Furness Rly., 162, 245
 — *v.* Holbrook, 232
 Arnot *v.* Brown, 157
 Arthur *v.* Lambe, 56
 Artistic Colour Printing Society, *Re*, 10
 Ashbury *v.* Watson, 481
 — Railway Carriage Co. *v.* Riche, 470, 480, 485, 486, 488
 Ashby *v.* Hincks, 68
 — *v.* Wilson, 366, 367, 407
 Ashton *v.* Stock, 113
 Ashton Vale Iron Co. *v.* Bristol Corp., 92, 98
 Ashworth *v.* Hebden, &c., Local Board, 397, 548
 Aslatt *v.* Mayor of Southampton, 4, 570
 Aspden *v.* Austin, 365, 366
 — *v.* Seddon, 168, 170, 204
 Astbury, *Ex parte*, 54
 Astley *v.* Manchester, Sheffield & Lincolnshire Rly., 475, 486
 Aston *v.* Aston, 66, 71
 Atkinson *v.* Grey, 445
 Atkyns *v.* Kinneir, 379, 381, 384, 388
 Att.-Gen. *v.* Acton Local Board, 186, 189, 202
 — *v.* Albany Hotel Co., 24, 568, 569
 — *v.* Andrews, 485, 510
 — *v.* Ashborne, 289, 508
 — *v.* Aspinall, 456, 508
 — *v.* Avon, Portreeve of, 506, 507
 — *v.* Barry Docks, &c., Co., 105
 — *v.* Basingstoke, 124, 205
 — *v.* Batley, 509
 — *v.* Belfast, Corporation of, 566
 — *v.* Bermondsey, 511
 — *v.* Biphosphated Guano Co., 228
 — *v.* Birmingham, Borough of, 18, 116, 184, 189, 201
 — *v.* Birmingham, &c., Derby Rly., 471
 — *v.* Birmingham Drainage Board, 10, 140
 — *v.* Birmingham & Oxford Rly., 471, 472
 — *v.* Bradford Canal Proprietors, 18, 24, 26, 139, 205
 — *v.* Brazenose College, 514
 — *v.* Brecon, 394, 485, 510
 — *v.* Briggs, 17, 172
 — *v.* Brighton Supply Ass., 117, 119, 226, 234, 235
 Att.-Gen. *v.* Burridge, 206
 — *v.* Cambridge Consumers' Gas Co., 120, 123
 — *v.* Carrington, Lord, 460
 — *v.* Cashel, Corporation of, 506
 — *v.* Chamberlain, 206
 — *v.* Church, 512
 — *v.* Cleaver, 119, 157
 — *v.* Clerkenwell Vestry, 208, 204
 — *v.* Cock, 514
 — *v.* Cockermouth Local Board, 134, 136, 471
 — *v.* Cole, 123, 156, 157
 — *v.* Colney Hatch Asylum, 124, 134, 135, 136, 137, 139, 202, 203, 580
 — *v.* Compton, 514, 551
 — *v.* Constable, 10
 — *v.* Cuming, 459, 515
 — *v.* Daniel, 512
 — *v.* Daugars, 458
 — *v.* Dorking, Guardians of, 10, 135, 203
 — *v.* Doughty, 144
 — *v.* Dublin, Mayor, &c., of, 506, 507
 — *v.* Eastern Counties Rly., 23, 105
 — *v.* Eastlake, 37, 513
 — *v.* Ely and Sutton Rly., 104
 — *v.* Emmerson, 210
 — *v.* Esher, &c., Co., 228
 — *v.* Etheridge, 459
 — *v.* Finchley Local Board, 202
 — *v.* Forbes, 14, 119, 137, 226
 — *v.* Foundling Hospital, 514
 — *v.* Fowler, 514
 — *v.* Francis, 156
 — *v.* Gas Light & Coke Co., 134
 — *v.* Gaunt, 513
 — *v.* Gould, 459
 — *v.* Great Eastern Rly., 102, 134, 181, 193, 200, 204, 470, 471, 486, 487, 490
 — *v.* Great Northern Rly., 105, 470, 471, 479, 597
 — *v.* Great Western Rly., 104, 472
 — *v.* Grocers' Co., 565
 — *v.* Hackney Local Board, 136
 — *v.* Halifax, Corporation of, 18, 203
 — *v.* Hardy, 465
 — *v.* Hatch, 111
 — *v.* Horner, 238

- | | |
|---|--|
| <p>Att.-Gen. <i>v. Hutton</i>, 458
 — <i>v. Johnson</i>, 187, 189, 206
 — <i>v. Kingston, Mayor, &c., of</i>,
 125, 207
 — <i>v. Lambeth Vestry</i>, 512
 — <i>v. Leeds, Corporation of</i>,
 18, 184, 189, 185, 201—3
 — <i>v. Lewis</i>, 561
 — <i>v. Lichfield, Bishop of</i>, 516
 — <i>v. Lichfield, Corporation of</i>,
 509
 — <i>v. Liverpool, Corporation</i>
 <i>of</i>, 456, 558, 586
 — <i>v. Lock</i>, 514
 — <i>v. Logan</i>, 87
 — <i>v. London and North-</i>
 <i>Western Rly.</i>, 87, 184,
 185, 471, 472
 — <i>v. London and South-</i>
 <i>Western Rly.</i>, 105, 571
 — <i>v. London County Council</i>,
 90, 510
 — <i>v. Lord Lonsdale</i>, 119, 206,
 207
 — <i>v. Luton Board of Health</i>,
 18, 187, 189, 202
 — <i>v. Manchester and Leeds</i>
 <i>Rly.</i>, 22, 114, 394
 — <i>v. Manchester Corporation</i>,
 18, 125, 157, 158, 160
 — <i>v. Marlborough, Duke of</i>,
 57, 74
 — <i>v. Mayo Cuonty Council</i>,
 284
 — <i>v. Merthyr Tydfil</i>, 188, 518
 — <i>v. Metropolitan Board of</i>
 <i>Works</i>, 84, 120, 184, 187
 — <i>v. Metropolitan Rly.</i>, 128,
 181
 — <i>v. Mid-Kent Rly.</i>, 86, 414
 — <i>v. Munro</i>, 458
 — <i>v. Murdoch</i>, 458
 — <i>v. Newbury</i>, 514
 — <i>v. Newcastle</i>, 508, 509
 — <i>v. Newcombe</i>, 507
 — <i>v. Nicholl</i>, 187
 — <i>v. Norwich</i>, 394, 510
 — <i>v. Plymouth, Mayor, &c.,</i>
 <i>of</i>, 192, 518
 — <i>v. Powis, Earl of</i>, 458, 516
 — <i>v. Preston (Mayor)</i>, 128
 — <i>v. Price</i>, 514
 — <i>v. Rathmines Commis-</i>
 <i>sioners</i>, 509
 — <i>v. Richmond</i>, 187
 — <i>v. Rickmansworth</i>, 511
 — <i>v. Sheffield Gas Co.</i>, 7, 14,
 17, 19, 62, 87, 117, 118,
 119, 120, 128, 189, 226,
 589</p> | <p>Att.-Gen. <i>v. Sherborne Hospital</i>, 461,
 515
 — <i>v. Shrewsbury Bridge Co.</i>,
 87, 184, 226, 471
 — <i>v. Simpson</i>, 286
 — <i>v. Smythies</i>, 518
 — <i>v. Southampton, Guardians</i>
 <i>of Poor of</i>, 510
 — <i>v. Southampton, Mayor,</i>
 <i>&c.</i>, 244
 — <i>v. Stawell</i>, 43
 — <i>v. St. Cross Hospital</i>, 514,
 515
 — <i>v. St. Helens</i>, 510
 — <i>v. St. John's Hospital</i>, 506
 — <i>v. Strong</i>, 544
 — <i>v. Swansea</i>, 394, 510, 511
 — <i>v. Terry</i>, 206, 207
 — <i>v. Tewkesbury and Malvern</i>
 <i>Rly.</i>, 102
 — <i>v. Thames, Conservators</i>
 <i>of</i>, 120, 187, 208, 225
 — <i>v. Thetford</i>, 512
 — <i>v. Tod-Heatley</i>, 122, 245
 — <i>v. Tomline</i>, 81, 48, 82, 114,
 210
 — <i>v. Tottenham Local Board</i>,
 510
 — <i>v. Tynemouth</i>, 510, 511
 — <i>v. United Kingdom Electric</i>
 <i>Telegraph Co.</i>, 87, 119
 — <i>v. Vyner</i>, 577
 — <i>v. Welsh</i>, 458
 — <i>v. West Hartlepool, &c.,</i>
 <i>Commissioners</i>, 510
 — <i>v. Widnes Rly.</i>, 115
 — <i>v. Wigan, Mayor, &c., of</i>,
 13, 394, 485, 509, 510
 — <i>v. Wilson</i>, 507, 508
 — <i>v. Wright</i>, 209, 556
 — <i>v. Yarmouth</i>, 568
 Auckland, Lord, <i>v. Westminster Board</i>
 <i>of Works</i>, 111
 Austen <i>v. Boys</i>, 452
 Austerberry <i>v. Corporation of Oldham</i>,
 228, 405, 412
 Australian Wine Importers' Case, 331
 Avanzo <i>v. Mudie</i>, 310
 Avery <i>v. Langford</i>, 380, 382
 — <i>v. Wood</i>, 327
 Ivory <i>v. Andrew</i>, 457, 594
 Aylett <i>v. Dodd</i>, 387
 Aylwin <i>v. Evans</i>, 535, 575
 Aynsley <i>v. Glover</i>, 141, 143, 150
 Ayr Harbour Trustees <i>v. Oswald</i>, 475
 Back <i>v. Stacy</i>, 141
 Backhouse <i>v. Bonomi</i>, 163, 164, 165
 Bacon <i>v. Jones</i>, 20, 21, 27, 246, 554, 590</p> |
|---|--|

- Badische Anilin Fabrik *v.* Basle, 250
 — — *v.* Johnson, 258, 271
 — — *v.* Levinstein, 262, 580
 Bagnall *v.* London and North-Western Rly., 174
 — *v.* Villar, 60
 Bagot *v.* Bagot, 36, 44, 45, 78, 461
 Bagot Co. *v.* Clipper Co., 491
 Bagshaw *v.* Brixton Local Board, 234
 — *v.* Eastern Union Rly., 478, 482
 Bailey *v.* Birkenhead, Lancashire, and Cheshire Junction Rly., 492
 — *v.* Hobson, 56
 Baily *v.* Clark, 181, 182, 191, 198
 — *v.* Taylor, 28, 277, 280
 Bainbridge *v.* Smith, 478, 492, 497
 Baines *v.* Geary, 379, 380, 385
 Baird *v.* Fortune, 188
 — *v.* Monkland Iron and Steel Co., 197
 — *v.* Wells, 500—502
 — *v.* Williamson, 196, 197
 Baker *v.* Hedgecock, 385
 — *v.* Sebright, 74, 75
 Balaghat Gold Mining Co., *Re*, 477, 478
 Baldwin *v.* Society of Useful Knowledge, 399
 Ball *v.* Ball, 542
 — *v.* Ray, 159, 584
 Ballard *v.* Dyson, 219
 — *v.* Tomlinson, 195
 Balls *v.* Strutt, 456
 Baltic Company *v.* Simpson, 145
 Bamford *v.* Turnley, 156
 Bankart *v.* Houghton, 17, 18, 27, 188
 Bankes *v.* Le Dispenser, 74
 Banks *v.* Gibson, 452
 Bannister *v.* Bigge, 162
 Banwen Iron Co., *Re*, 567
 Barber *v.* Penley, 119, 125, 159, 162, 209, 234
 Barff *v.* Probyn, 58
 Barfield *v.* Nicholson, 281, 371, 405, 598
 Bargate *v.* Shortridge, 477
 Barham *v.* Hodges, 159
 Baring *v.* Uruguay Rly., 578
 Barker *v.* Goodair, 519
 — *v.* North Staffordshire Rly., 22, 95, 585
 Barkshire *v.* Grubb, 212
 Barlow *v.* Bailey, 156, 581
 — *v.* Rhodes, 223
 Barnes *v.* Loach, 146
 — *v.* Southsea Rly., 98
 Barney *v.* United Telephone Co., 448
 Barnsley Canal Co. *v.* Twibell, 520
 Baron *v.* Portslade U. C., 186
 Barracrough *v.* Johnson, 229
 Barran *v.* Lomas, 319
 Barrett *v.* Barrett, 40
 Barrington, *Re*, 75
 Barrow *v.* Isaacs, 375
 Barry *v.* Barry, 36, 37, 66, 70
 Bartlett *v.* Phillips, 64
 Baschet *v.* London Illustrated, &c., 278, 314, 324, 327, 481
 Bass *v.* Dawber, 355
 — *v.* Gregory, 162
 Batcheller *v.* Tunbridge Wells Gas Co., 125, 202
 Bateman *v.* Black, 226
 — *v.* Boynton, 520
 — *v.* Mid-Wales Rly., 489
 — *v.* Poplar District Board, 136, 137, 204
 — *v.* Wiatt, 572
 Bates *v.* Donaldson, 375
 Bathurst *v.* Burden, 44, 395
 — *v.* Kearsley, 302
 Batten *v.* Gedye, 65
 Battersea, Lord *v.* Commissioners of Sewers, 150
 Battersea Vestry *v.* County of London, &c., Co., 84, 110, 111
 Batty *v.* Hill, 341
 Baxendale *v.* M'Murray, 189
 — *v.* N. Lambeth Club, 215
 Baxter *v.* Bowen, 33, 143, 154, 159, 598
 — *v.* Lewis, 378
 — *v.* West, 453
 Bayley *v.* Edmunds, 448
 — *v.* Great Western Rly., 148, 211, 212, 213, 475, 477
 Baylis *v.* Grout, 424
 Bayly *v.* Went, 465
 Beal, *Ex parte*, 309, 318
 Beale *v.* Saunders, 49
 Bealey *v.* Shaw, 183, 185, 186, 188
 Beardmer *v.* London and North Western Rly., 101, 575
 Beardmore *v.* Treadwell, 156, 245
 Beauchamp, Earl of, *v.* Darby, 137, 518, 520
 — — *v.* Lord Huntley, 521
 Beauman *v.* Kinsella, 186
 Beazley *v.* Soares, 341
 Beck *v.* Rebow, 53
 Beckett *v.* Corporation of Leeds, 281
 Beckford *v.* Kemble, 522
 Beddington *v.* Atlee, 147, 148
 Beddow *v.* Beddow, 539
 Bedford (Duke) *v.* British Museum, 361
 — *v.* Ellis, 239

- Beer *v.* Ward, 420, 422
 Beeston *v.* Ford, 284
 — *v.* Weate, 187, 191, 205
 Bell *v.* Earl Dudley, 168
 — *v.* Hull and Selby Rly., 556, 588
 — *v.* Joel, 115
 — *v.* Love, 48, 165, 169
 — *v.* Midland Rly., 105, 121, 225, 244
 — *v.* Quebec, Corporation of, 208
 — *v.* Sierra Nevada Co., 486
 — *v.* Walker, 298
 — *v.* Whitehead, 280, 294
 — *v.* Wilson, 45, 75, 564
 Bellerby *v.* Rowland, &c., Co., 484
 Belmore *v.* Kent County Council, 282
 Beman *v.* Rufford, 482
 Benbow *v.* Low, 344
 Benedictus *v.* Sullivan, 844, 847
 Benjamin *v.* Storr, 119, 225
 Benno Jaffe, &c., *v.* Richardson, 261
 Bentinck *v.* Norfolk Estuary Co., 104
 Bentley *v.* Bates, 77
 Benwell *v.* Inns, 377, 382
 Bergman *v.* Macmillan, 247
 Berkhamstead School, *Ex p.*, 514
 Berliner *v.* Edison, 448
 Bermondsey Vestry *v.* Brown, 87, 229, 280
 Bernard *v.* Meara, 395
 Berney *v.* Sewell, 466
 Berridge *v.* Ward, 231
 Berry *v.* Exchange Trading Co. 575
 Besant *v.* Wood, 10, 368, 374, 517, 540
 Besemerer *v.* Besemerer, 561
 Best *v.* Drake, 88
 Betts *v.* Clifford, 574
 — *v.* De Vitre, 249, 259
 — *v.* Gallais, 270
 — *v.* Neilson, 256, 584
 — *v.* Willmott, 252
 Betty, *Re*, 52
 Bevan *v.* Webb, 447
 Bewley *v.* Atkinson, 149, 151
 Beyfus *v.* Bullock, 538
 Bickett *v.* Morris, 178, 179, 198
 Bickford *v.* Skewes, 252, 264, 588
 Bickmore *v.* Dimmer, 548
 Bidder *v.* North Staffordshire Rly., 214, 217
 — *v.* Trinidad Petroleum Co., 371
 Biddulph *v.* St. George's Vestry, 120, 134, 162
 Biggs *v.* Head, 421, 423
 — *v.* Hoddinott, 468
 Bigsby *v.* Dickinson, 156
 Bill *v.* Cureton, 457
 Bingley *v.* Marshall, 584
 Birch *v.* Mather, 253
 Birch Wolfe *v.* Wolfe, 74, 78
 Bird *v.* Bird's Patent, &c., Sewage Co., 488
 — *v.* Eggleton, 475, 477
 — *v.* Lake, 379, 386, 387, 552, 560, 562
 — *v.* Relph, 50, 68
 Birley *v.* Chorlton-on-Medlock, Con-
 stables of, 137
 Birmingham Breweries *v.* Jameson, 369
 Birmingham Canal Co. *v.* Lloyd, 17
 Birmingham District Land Co. *v.* L. &
 N. W. Rly., 94
 Birmingham District Land Co. and
 Allday, 366, 407, 409
 Birmingham, Dudley, &c., Banking Co.
 v. Ross, 147, 167
 Birmingham, Mayor, &c., of, *v.* Allen, 164
 Birmingham Vinegar Co. *v.* Powell, 424
 Black *v.* Ballymena, &c., Commis-
 sioners, 185
 — *v.* Murray, 291
 Blackburn Soc. *v.* Brooks, 481, 489
 Blackburne *v.* Somers, 190, 191, 193
 Blackett *v.* Bates, 356
 — *v.* Bradley, 169
 Blackmore *v.* White, 52
 Blackwell *v.* Harper, 309
 Blagrove *v.* Blagrove, 56
 Blair *v.* Deakin, 185
 Blake *v.* Peters, 86, 58, 76
 — *v.* Wallscourt, 542
 — *v.* Woolf, 197, 198
 Blakeley *v.* Dent, 535
 Blakemore *v.* Glamorganshire Rly., 15, 20, 81, 88, 204, 414
 Blakesley's Trust, *Re*, 530, 582
 Blamey *v.* Blamey, 559
 Blanchard *v.* Bridges, 147
 Blank *v.* Footman, 429
 Blantyre, Lord, *v.* Dunn, 185
 Blewett *v.* Jenkins, 41
 Bliss *v.* Hall, 157
 Blissett *v.* Daniel, 448
 Bloomfield *v.* Eyre, 551, 590
 Blount *v.* Legard, 207
 Bloxam *v.* Elsee, 248
 — *v.* Metropolitan Rly., 14, 478, 479, 483
 Blundell *v.* Catterall, 210
 Bodger *v.* Bodger, 467
 Bogue *v.* Houlston, 285, 310
 Bohn *v.* Bogue, 23, 280, 293, 294, 295
 Bolton *v.* Bolton, 211, 222, 542
 — *v.* London School Board, 566
 Bond *v.* Barrow Hematite Steel Co., 484
 Bonnard *v.* Perryman, 6, 486

- Bonner *v.* Great Western Rly., 471, 474, 475
 Bonnet *v.* Sadler, 50, 378
 Boosey *v.* Fairlie, 306
 — *v.* Purday, 291
 — *v.* Whight, 291
 Booth *v.* Alcock, 148
 — *v.* Lord Leycester, 528
 — *v.* New Africander Gold Mining Co., 488
 — *v.* Ratté, 206
 Bordier *v.* Burrell, 577, 578
 Borgnis *v.* Edwards, 374
 Borthwick *v.* Evening Post, 30, 384, 386, 340
 Bostock *v.* North Staffordshire Rly., 162, 475
 — *v.* Ramsey Urban Council, 576
 — *v.* Sidebottom, 214
 Boucicault *v.* Chatterton, 304, 308, 321
 — *v.* Delafield, 284, 321
 — *v.* Warde, 307
 Boulnois *v.* Peake, 384
 Boulter *v.* Mutual Loan, &c., Association, 468
 Bourbaud *v.* Bourbaud, 587
 Bourke *v.* Alexandra Hotel Co., 30, 144
 — *v.* Davis, 226
 Bourne *v.* Taylor, 47
 Bovill *v.* Crate, 247, 254
 Bowden *v.* Yoxall, 601
 Bowen *v.* Phillips, 444
 Bower *v.* Hill, 219
 Bowes *v.* Law, 367, 374, 414, 417
 Bowles', Lewis, Case, 42, 57, 66
 Bowser *v.* M'Clean, 47, 48, 58, 215
 Box *v.* Allen, 187
 — *v.* Jubb, 197
 Boyce *v.* Gill, 558, 586
 — *v.* Paddington, 551
 Boyse, *Re*, 527
 Brace *v.* Taylor, 36
 Bracher *v.* Bracher, 264, 267
 Bradbury *v.* Sharp, 286
 Bradford Corp. *v.* Ferrand, 185, 195
 — *v.* Pickles, 198, 194
 Bradburn *v.* Morris, 210, 217, 219
 Bradbury *v.* Dickens, 450, 452
 — *v.* Hotten, 298
 Brampton *v.* Beddowes, 378
 Bramwell *v.* Halcomb, 20, 22, 278, 279, 280, 298, 587
 — *v.* Lacy, 374
 Brand *v.* Mitson, 445, 538, 555
 Braunstein *v.* Accidental Death Insurance Co., 364
 Breay *v.* Royal British Nurses' Ass. 488, 488
 Brett *v.* Clowser, 211, 212
 Brett *v.* East India and London Shipping Co., 399
 Bricheno *v.* Thorp, 428
 Bridewell Hospital *v.* Ward, 150
 Bridges *v.* Highton, 207
 Bridson *v.* Benecke, 254
 Brierley Hill L. B. *v.* Pearsall, 133
 Briggs *v.* Lord Oxford, 78, 364
 Bright *v.* North, 485
 — *v.* River Plate Co., 539
 Briscoe *v.* Drought, 187, 191, 192—4
 Bristol, Dean and Chapter of, *v.* Jones, 42
 Bristol, &c., Rly. *v.* Somerset Rly., 92
 Bristow *v.* Cormican, 178
 British Motor Syndicate *v.* Taylor, 256, 257, 258
 British Natural, &c., Association *v.* Bywater, 575
 Briton, &c., Life Association, *Re*, 8
 Broadbent *v.* Imperial Gas Co., 156, 244
 — *v.* Ramsbotham, 184, 193
 Brocklesby *v.* Munn, 415
 Broder *v.* Saillard, 121, 122, 156, 159, 162, 580
 Brook *v.* Evans, 546
 — *v.* M. S. & L. Rly., 98
 Brooking *v.* Maudsley,
 Brooks *v.* Cock, 310
 — *v.* Greathed, 466
 — *v.* Jennings, 365
 — *v.* Purton, 588
 Broom *v.* Batchelor, 364
 Broomfield *v.* Williams, 147
 Brown *v.* Alabaster, 212
 — *v.* Blest, 188
 — *v.* Cooke, 302
 — *v.* Dunstable Corp., 124, 189, 204
 — *v.* Frost, 552
 — *v.* Newall, 586, 587
 — *v.* Robertson, 557
 — *v.* Windsor, 176
 Browne *v.* La Trinidad, 492
 — *v.* Monmouthshire Canal Co., 492
 — *v.* Robins, 164
 Browning *v.* Wright, 364
 Brune *v.* James, 11
 Brunton *v.* Hall, 215, 216
 Bryant *v.* Hancock, 368
 — *v.* Lefevre, 155, 162
 — *Re*, 594, 600
 Brydges *v.* Kilburn, 50
 — *v.* Stephens, 40, 71, 72
 Bubb *v.* Yelverton, 78
 Buchanan *v.* Andrew, 169
 Buckland *v.* Butterfield, 53
 Buckle *v.* Fredericks, 373
 Buckley & Sons *v.* Buckley, 197
 Bullen *v.* Denning, 41

- Bulli Coal Mining Co. v. Osborne, 112
 Bullin v. Teece, 881
 Bullivant v. Att.-Gen. for Victoria, 422, 428
 Bullock v. Chapman, 454
 Bunbury v. Bunbury, 524
 Bunn v. Guy, 881
 Bunting v. Hicks, 184
 Burchell v. Wilde, 889, 451—8
 Burdett v. Hay, 565, 585, 589
 Burgess v. Burgess, 888
 — v. Hill, 29, 578
 — v. Horne, 559
 — v. Lamb, 78
 Burgoine v. Moordaff, 577
 Burland v. Earle, 491, 495, 496
 Burnett v. Chetwood, 299, 481
 Burrell v. Delavante, 445
 Burrows v. Lang, 190, 192, 200
 Burt v. British Nation Life Assurance Association, 480
 Burton v. Blakemore, 564
 Bury v. Bedford, 837, 838, 846
 Bushby v. Munday, 528
 Butler v. Gardener, 557
 Butt v. Dunnett, 882
 — v. Imperial Gas Co., 145
 Butterworth v. Kelly, 279
 — v. Robinson, 298, 299, 808
 Butts v. Matthews, 564
 Buxton v. Calcote, 245
 — v. James, 277
 Byron (Lord) v. Dugdale, 292
 — v. Johnstone, 889, 555, 559
- CABLE v. Marks, 290, 291
 Cadbury v. Walker, 162
 Cade v. Newenham, 245
 Cadiz Waterworks Co. v. Barnett, 544
 Cahill v. Cahill, 874
 Caird v. Sime, 480, 484, 485
 Calcraft v. Guest, 422
 — v. Thomson, 142
 — v. West, 122
 Caldwell v. Baylis, 58
 — v. Maclaren, 178, 288
 — v. Pagham Harbour, &c., Co., 568
 — v. Vanvissingen, 249, 264
 Caledonian and Dumbartonshire Rly. v. Magistrates of Helensburgh, 491
 Caledonian Rly. v. Colt, 181
 — — v. Lord Belhaven, 167
 — — v. Solway Junction Rly., 485
 — — v. Sprot, 167, 178, 175
 — — v. Walker's Trustees, 225
- Calvert v. Gason, 58
 — v. Gray, 558
 Campana v. Webb, 550
 Campbell v. Allgood, 86, 68, 74
 — v. Lang, 226
 — v. Scott, 294
 Campbell-Davys v. Lloyd, 284
 Canadian Pacific Rly. v. Parke, 180
 — — v. Roy, 129
 Canham v. Fisk, 152
 — v. Jones, 424
 Cannon v. Trask, 494
 — v. Villars, 213
 Capes v. Hutton, 857
 Capps v. Norwich and Spalding Rly., 109
 Caproni v. Alberti, 815
 Cardiff, Mayor of, v. Cardiff Waterworks Co., 20
 Cardigan (Earl of) v. Armitage, 46
 Cardinal v. Cardinal, 577
 — v. Molyneux, 65, 588
 Carew, *Ex parte*, 567
 — v. Yates, 561
 Carlisle v. South Eastern Rly., 478, 480
 Carlyon v. Lovering, 187
 Carnes v. Nesbitt, 881, 887, 892
 Carr v. Foster, 150, 190
 — v. Morice, 550, 561
 Carron Iron Co. v. Maclaren, 9, 521, 524, 525, 527
 Carrow v. Ferrier, 594, 600
 Carstairs v. Taylor, 198
 Carter v. Cropley, 458, 459
 — v. Fey, 550, 554
 — v. Great Eastern Rly., 95
 Cartier v. Carlisle, 852
 Cartwright, *Re*, 51
 — v. Last, 580
 Carver v. Pinto Leite, 844
 Cary v. Faden, 278
 — v. Longman, 290, 291
 Casamajor v. Strode, 61, 551, 552
 Case v. Midland Rly., 189, 204, 580
 Casey, *Re*, 819
 Cash v. Cash, 888, 886, 451
 Cass v. Bailey, 567
 Cassell v. Stiff, 286
 Castelli v. Cook, 558, 564, 565, 586, 587
 Castle v. Collins, 413
 Cate v. Devon Newspaper Co., 286
 Catt v. Tourle, 881, 401, 405
 Catton v. Wild, 584
 Cawkwell v. Russell, 190
 Central Sugar Factories of Brazil, *Re*, 528
 Cercle Restaurant Co. v. Lavery, 10, 517, 544
 Chadwick v. Marsden, 199
 Chaffers v. Baker, 557

- Challender *v.* Royle, 441, 442
 Chamber Colliery Co. *v.* Hopwood, 186
 — — — *v.* Rochdale Canal Co., 170
 Chamberlain's Wharf *v.* Smith, 504
 Chamberlayne *v.* Dummer, 68, 71
 Chambers *v.* Manchester and Milford Rly. 487
 — *v.* Toynbee, 558
 Champion *v.* Birmingham Vinegar Co., 440
 Chandler *v.* Thompson, 145
 Chandos (Duke of) *v.* Talbot, 89
 Chanock *v.* Hertz, 555
 Chaplin & Co. *v.* Westminster Corp., 225
 Chapman *v.* Auckland Union, 187, 588
 Chappell *v.* Boosey, 803, 804
 — *v.* Davidson, 28, 29, 287, 889, 554
 — *v.* Purday, 291
 — *v.* Sheard, 807, 847
 Charles *v.* Finchley Local Board, 124, 204
 Charlton *v.* Jones, 465
 — *v.* Poulter, 449
 Charnock *v.* Court, 248
 Chasemore *v.* Richards, 179, 185, 198, 194
 Chastey *v.* Ackland, 154
 Chatteris *v.* Isaacson, 888
 Chatterton *v.* Cave, 298, 806
 Cheavin *v.* Walker, 845
 Chedworth, Lord, *v.* Edwards, 529
 Cheetham *v.* Nuthall, 260
 Chertsey Market, *Re*, 457
 Chester (Dean) *v.* Smelting Corp., 125, 590, 597
 Chibnell *v.* Paul, 122, 162
 Child *v.* Douglas, 18, 21, 361, 867, 874, 416, 563
 Chilliner *v.* Chilliner, 389
 Chilton *v.* Progress Printing Co., 291
 Chitty *v.* Bray, 863, 410
 Chivers *v.* Chivers, 888
 Chollett *v.* Hoffman, 248
 Cholmondeley, Earl, *v.* Lord Clinton, 428, 465
 Christie *v.* Davey, 159
 Chubb *v.* Griffiths, 855
 Churchward *v.* Reg., 865
 Churton *v.* Douglas, 888, 888, 886, 450, 451
 Civil Service Supply Association *v.* Dean, 884
 Clarence Rly. *v.* Great Northern Rly., 108
 Clark *v.* Adie, 260
 — *v.* Clark, 875
 Clark *v.* Cogge, 220, 221
 — *v.* Freeman, 884, 482
 — *v.* Leach, 450
 — *v.* Royston, 49
 — *v.* School Board for London, 98, 96, 112, 132
 Clarke *v.* Clarke, 22, 142
 — *v.* Ferguson, 265
 — *v.* Jacques, 557, 578
 — *v.* Manchester, Sheffield and Lincolnshire Rly., 90, 866
 — *v.* Nichols, 265
 — *v.* Price, 898
 — *v.* Rugge, 222
 — *v.* Skipper, 578
 — *v.* Watkins, 878
 Clarke's Design, *Re*, 818
 Clarkson *v.* Edge, 877
 Clavering *v.* Clavering, 45
 Claxton *v.* Claxton, 187
 Clay *v.* Rufford, 479
 Cleeve *v.* Mahany, 141
 Clegg *v.* Clegg, 77
 — *v.* Dearden, 197
 — *v.* Edmondson, 16, 17, 87
 — *v.* Hands, 869, 878, 408
 — *v.* Rowland, 44, 45
 Clementi *v.* Walker, 291, 292, 810
 Clements *v.* Welles, 867, 872, 411, 552
 Clifford *v.* Holt, 149
 Clifton *v.* Robinson, 586
 Climie *v.* Wood, 54
 Clinch *v.* Depson, 45
 — *v.* Financial Corporation, 488
 Clough *v.* Radcliffe, 500
 Clowes *v.* Beck, 84
 — *v.* Staffordshire Potteries Co., 123, 126, 202
 Coats *v.* Chadwick, 489, 548
 — *v.* Clarence Rly., 128, 205
 Cockell *v.* Bacon, 462
 Cockrane *v.* Macnish, 845
 Cocks *v.* Purday, 288, 291
 Coffin *v.* Coffin, 24, 85, 86, 68
 Cohen *v.* Poland, 88
 — *v.* Wilkinson, 482
 Colburn *v.* Duncombe, 277, 288
 — *v.* Simms, 28, 29, 30, 77, 272, 279, 298, 826
 Cole *v.* Forth, 50
 — *v.* Green, 50
 — *v.* Peyson, 43, 54
 Colebeck *v.* Girdlers' Co., 177
 Colebourne *v.* Colebourne, 444, 550, 555
 Coleman *v.* West Hartlepool Rly., 547, 566
 Coles *v.* Simms, 18, 387, 391, 410, 578
 Collard *v.* Allison, 264
 — *v.* Cooper, 555
 — *v.* Marshall, 244, 438, 440

- Collette v. Goode, 277, 286
 Colley v. Hart, 488, 442
 Collingridge v. Emmott, 286, 802
 Collins v. Castle, 409
 — v. Lamport, 466
 — v. Locke, 376, 880, 885
 — v. Plumb, 359
 — v. Slade, 159, 218, 216, 874
 Collins Co. v. Reeves, 848
 — v. Walker, 848
 Collis v. Cater, 290
 — v. Laughner, 151
 Collison v. Warren, 554
 Colman v. Eastern Counties Rly., 482
 Companhia de Mocambique v. British
 S. Africa Co., 9
 Company, *Re* A, 10, 517, 544
 Compton v. Richards, 148
 Comyns v. Hyde, 285, 810
 Conacher v. Conacher, 557
 Const v. Harris, 454, 552
 Constable and Cranswick, *Re*, 61
 Cook v. Bath (Mayor, &c., of), 87, 119
 Cooke v. Forbes, 128, 156
 — v. Whaley, 67
 Cooper v. Barber, 181
 — v. Crabtree, 88, 121, 869
 — v. Gordon, 458
 — v. Hubbock, 149, 150, 152, 187
 — v. Shropshire Union Rly., 492
 — v. Stephens, 809
 — v. Straker, 151
 — v. Watson, 450
 — v. Whittingham, 14, 28, 272,
 279, 288, 327, 578
 Coote v. Ingram, 579
 — v. Judd, 277, 286
 Coppinger v. Gubbins, 88, 47, 58
 Corcoran v. Witt, 574
 Cornish v. New, 58
 — v. Upton, 290
 Cornwall v. Hawkins, 377
 Correspondent Newspaper Co. v.
 Saunders, 287
 Cory v. Thames Iron Co., 584
 — v. Yarmouth and Norwich Rly.,
 15, 22, 285
 Costa Rica v. Erlanger, 568
 Cotching v. Bassett, 188, 189
 Cotesworth v. Stephens, 518, 519
 Cother v. Midland Rly., 108, 571
 Cotton v. Gillard, 329, 426
 Coulson v. Coulson, 486
 Coulton, *Re*, 557
 Court v. Barr, 562
 Courtauld v. Legh, 151
 Courtown (Lord) v. Ward, 37, 46, 62
 Coutts v. Gorham, 146
 Coventry v. London, Brighton, &c.,
 Rly., 101
 Cowen v. Philipps, 178
 Cowley (Earl) v. Byas, 14, 126
 — v. Cowley, 544, 545
 — v. Wellesley, 40
 Cowling v. Higginson, 216, 219
 Cox v. Cox, 482
 Cox and Neve, *Re*, 411
 Cracknall v. Janson, 80
 Craig's Claim, 588
 Crampton v. Bishop of Meath, 76
 — v. Patent Investments Co.,
 260
 Crane v. Price, 259
 Cranstoun (Lord) v. Johnstone, 586
 Craven v. Kay, 580
 Crawford v. Hornsea, &c., Steam Co.,
 156, 583
 — v. North Eastern Rly., 484
 Cregan v. Cullen, 87
 Crockford v. Alexander, 61
 Croft v. Day, 884
 Crofts v. Haldane, 144
 Cromford and High Peak Rly. v.
 Stockport, &c., Rly., 22
 Crompton v. Lea, 196
 Crookes v. Petter, 840
 Cropper, *Ex parte*, 488
 Cross, *Re*, 588
 Crossley v. Beverley, 270
 — v. Derby Gas Light Co., 16,
 28, 265
 — v. Lightowler, 185, 186, 188,
 190, 202
 — v. Stewart, 258
 Crossman v. Bristol and South Wales
 Rly., 184
 Crowder v. Tinkler, 161
 Croysdale v. Sunbury U. C., 186
 Crozat v. Brogden, 568
 Crumbie v. Wallsend L. B., 168
 Crump v. Lambert, 156, 157, 159
 Cruttwell v. Lye, 885, 450
 Cubitt v. Maxse, 227, 228
 — v. Palmer, 177
 Cuddon v. Morley, 47, 59
 Cumberland v. Copeland, 287
 Cummins v. Perkins, 4, 541
 Cunliffe v. Whalley, 282
 Curriers' Co. v. Corbett, 88, 141
 Curtis, *Re*, 542
 — v. Cutts, 250, 264
 — v. Kesteven, 282
 Cuthbert v. Fane, 567
 D. v. A. & Co., 572, 594
 Dadson v. East Kent Rly., 97
 Daggett v. Ryman, 882, 408
 Dalby v. Hirst, 49

- Dale *v.* Humfrey, 366
 Dales *v.* Weaver, 378
 Dalglish *v.* Jarvie, 268, 429, 558, 586
 D'Almaine *v.* Boosey, 298, 304, 306
 Dalmer *v.* Dashwood, 60
 Dalton *v.* Angus, 144, 168—166, 176
 — *v.* Gill, 58
 Daly *v.* Edwards, 375
 Damper *v.* Bassett, 224
 Dance *v.* Goldingham, 456
 Dand *v.* Kingscote, 214, 217
 Daniel *v.* Anderson, 218
 — *v.* Ferguson, 84
 — *v.* Whitehouse, 341, 342
 Dann *v.* Spurrer, 27
 D'Arcy *v.* Askwith, 42, 49, 220
 Dare *v.* Heathcoate, 219
 Darley Main Colliery *v.* Mitchell, 168
 Darvall *v.* Dougall, 162
 Dashwood *v.* Magniac, 89, 40, 78
 Dangers *v.* Rivaz, 458, 459, 514
 Davenport *v.* Davenport, 37, 74, 81, 565
 — *v.* Jepson, 264
 David and Matthews, *Re*, 451
 Davidson *v.* Leslie, 567
 Davies *v.* Clough, 422, 428
 — *v.* Davies, 51, 376, 379, 384, 885
 — *v.* Hodgson, 450
 — *v.* James, 370
 — *v.* Makuna, 360
 — *v.* Marshall, 18, 27, 139
 — *v.* Sear, 16, 27, 221
 — *v.* Townsend, 260
 — *v.* Williams, 188
 Davis *v.* Amer, 451
 — *v.* Forman, 404, 405
 — *v.* Jenkins, 459, 507
 — *v.* Duke of Marlborough, 57
 — *v.* Mason, 381
 — *v.* Miller, 438
 — *v.* Treharne, 168
 Davis & Co. *v.* Committi, 287
 Davison *v.* Gillies, 482
 Daw *v.* Eley, 270, 593, 600
 Dawes, *Ex parte*, 364
 — *v.* Bagnall, 112
 — *v.* Hawkins, 229, 230
 Dawkins *v.* Antrobus, 501—508
 — *v.* Simonetti, 525, 528
 Dawson *v.* African Consolidated Land Co., 498
 — *v.* Beeson, 558, 557
 — *v.* Paver, 125, 137, 139, 196, 597
 — *v.* Thompson, 542
 — *v.* Yates, 559
 Day, *Ex parte*, 549
 Day *v.* Brownrigg, 6, 333, 545
 — *v.* Longhurst, 536
 — *v.* Merry, 68
 — *v.* Snee, 27, 590
 Dean *v.* Bennett, 458
 — *v.* Thwaite, 28, 112
 Deere *v.* Guest, 84, 114
 De Falbe, *Re*, 53, 54
 Delafield *v.* Ganabeus, 533
 Delarue *v.* Dickenson, 254
 Delfe *v.* Delamotte, 325, 326
 Delondre *v.* Shaw, 342
 De Mattos *v.* Gibson, 357, 360, 394, 400, 405
 Dence *v.* Mason, 333, 335
 Dendy *v.* Henderson, 380, 381
 De Nicolls *v.* Abel, 372, 415
 Denley *v.* Blore, 249
 Dent *v.* Auction Mart Co., 141, 142, 143
 — *v.* Turpin, 339, 341, 352
 Denton *v.* Denton, 55
 De Rutzen *v.* Lloyd, 288
 De Salis *v.* Crossan, 46
 De Tastet *v.* Bordenave, 564
 De Vitre *v.* Betts, 533, 534
 Devonport (Mayor, &c., of) *v.* Plymouth Tramways Co., 87
 — *v.* Tozer, 5, 8, 14, 135, 138
 Devonshire (Duke) *v.* Pattinson, 179
 Dick *v.* Haslam, 272
 Dickens *v.* —, 295
 — *v.* Lee, 28, 279, 298
 Dickenson *v.* Grand Junction Canal Co., 185, 412, 413, 590
 Dickinson *v.* Harbottle, 143
 Dicks *v.* Brooks, 309, 313, 439
 — *v.* Yates, 285, 287, 292, 339, 340
 Dickson *v.* Lough, 387
 Dilly *v.* Doig, 277
 Dimech *v.* Corlett, 337, 338
 Dimond *v.* Newburn, 51
 Dixon *v.* Caledonian Rly., 174
 — *v.* Fawcus, 355
 — *v.* Metropolitan Board of Works, 197
 — *v.* White, 163, 168
 Dockrell *v.* Dougall, 334, 439, 545
 Dodd *v.* Burchell, 211, 222
 — *v.* Salisbury and Yeovil Rly., 104
 Dodsley *v.* M'Farquhar, 290, 431
 Doe *v.* Bird, 51, 374
 — *v.* Bristol and Exeter Rly., 102
 — *v.* Earl of Burlington, 38, 50
 — *v.* Childe, 461
 — *v.* Hampton, 232
 — *v.* Jackson, 51
 — *v.* Lock, 41
 — *v.* North Staffordshire Rly., 39, 96, 100, 102, 103

Doe v. Pearsey, 282
 — *v. Price*, 41
 — *v. Spry*, 878
 — *v. Wilson*, 42
Doggett v. Curnow, 50
Doherty v. Allmann, 88, 51, 62, 870, 894
Domville v. Ford, 390
Donaldson v. Beckett, 283
Donnell v. Bennett, 400, 408, 404
Donnelly v. Donnelly, 540
Doolittle v. Walton, 580
Doran v. Carroll, 86, 116
Dorchester (Mayor, &c., of) v. Ensor, 240
Dover Gas Co. v. Mayor, &c., of Dover, 162, 226
Dover Harbour (Warden of) v. London, Chatham and Dover Rly., 571
 — *v. South Eastern Rly.*, 86, 413, 416, 475, 487
Dowling v. Betjeman, 15, 584
 — *v. Pontypool, &c., Ry.*, 86, 91, 102, 108
Downshire, Marquis of, v. Sandys, 68, 69, 72
Doyle v. Muntz, 479
Driffield v. Waterloo Mills, 440, 441
Drury v. Army and Navy Co-Operative Supply Co., 177
 — *v. Molins*, 395
Dubost v. Beresford, 310
Du Boulay v. Du Boulay, 544
Dubowski v. Goldstein, 885
Duck v. Bates, 282, 304
Ducketts v. Whitehead, 278
Dudden v. Guardians of Clutton Union, 184
Dudgeon v. Thompson, 260, 261, 263, 268
Dudley Canal Co. v. Grazebrook, 170, 171
 — (Corporation of) *v. Dudley's Trustees*, 178
Duignan v. Walker, 884
Duke v. Littleboy, 504
Dummer v. Corporation of Chippenham, 460
Duncan v. Louch, 225
Dunlop Pneumatic Tyre Co. v. Neal, 84, 258
 — *v. Stone*, 266
Dunn v. Bryan, 71
 — *v. Flood*, 456
Dunning v. Grosvenor Dairies, 590
Dunsany v. Dunne, 79
Dupuy v. Dilkes, 812, 815
Durell v. Pritchard, 82, 88
Durham (Bishop of) v. Corporation of Newcastle, 66

Durham and Sunderland Rly. v. Walker, 214, 217
 — *v. Wawn*, 56
Durrant v. Branksome U. C., 196
Dyke v. Stephens, 520
 — *v. Taylor*, 2, 14
Dynevor (Lord) v. Tennant, 217

EACHUS v. Moss, 116
Eaden v. Frith, 20, 159
Eardley v. Lord Granville, 41, 47, 48, 58, 84, 115, 588
East v. Harding, 42
 — *v. Whitney*, 877
East Anglian Rly. v. Eastern Counties Rly., 485
Eastern S. African Telegraph Co. v. Cape Town Tramways, 197
Eastern Telegraph Co. v. Dent, 875
East Freemantle Corporation v. Annois, 128
East and West India Docks, &c., Rly. v. Dawes, 108
East and West India Docks Co. v. Gattke, 183
East Lancashire Rly. v. Hattersley, 14, 21, 22, 858, 562
Eastman Photographic Co. v. Comptroller General, 830
East Molesey L. B. v. Lambeth Waterworks, 568
East of England Bank, Re, 599
Eastwood v. Lever, 861, 862, 409
Eaton v. Lake, 804, 805
 — *v. Swansea Waterworks Co.*, 150
Eccles v. Liverpool Borough Bank, 575
Ecclesiastical Commissioners v. Kino, 141, 144, 152
 — *v. Wodehouse*, 64
Eckersley v. Mersey Docks, 589
Ecroyd v. Coulthard, 179
Edelsten v. Edelsten, 829, 850, 852, 854
 — *v. Vick*, 345
Eden v. Foster, 518
Edenborough v. Archbishop of Canterbury, 515
Edginton v. Edginton, 545
Edinburgh and Glasgow Rly. v. Campbell, 395
Edinburgh, Perth and Dundee Rly. v. Philipp, 864
Edinburgh, &c., Tramways Co. v. Black, 102
Edison v. Holland, 271
Edison-Bell Phonograph v. Bernstein, 268
 — *v. Hough*, 266, 268
 b 2

- Edwardes *v.* Barrington, 375
 Edwards *v.* Jolliffe, 282
 — *v.* Spaight, 564
 Edwards' Trade Mark, 329, 330, 332, 337
 Edwick *v.* Hawkes, 373
 Ehrman *v.* Bartholomew, 405
 Electric Power Co., *Re*, 423
 Electric Telegraph Co. *v.* Brett, 248
 Eley *v.* Read, 465
 Elias *v.* Griffith, 37, 62, 76
 — *v.* Snowden Slate Quarries, 44, 45
 Elliman *v.* Carrington, 6
 Elliott *v.* Brown, 449
 — *v.* North Eastern Rly., 164, 167, 168, 173, 175, 571
 Ellis *v.* Bromley Local Board, 45
 — *v.* Corporation of Bridgnorth, 187, 244
 — *v.* Ellis, 540
 — *v.* Grey, 7
 — *v.* National Union, &c., 448
 Elmhirst *v.* Spencer, 21, 201
 Elmsley *v.* Beresford, 447
 — *v.* North Western Rly., 100
 Elmslie *v.* Boursier, 257
 Elphinstone *v.* Monkland Iron Co., 387, 388, 537
 Elsas *v.* Williams, 271, 588
 Elsey *v.* Adams, 560
 Elves *v.* Crofts, 379, 383
 Elwell *v.* Crowther, 125
 Elwes *v.* Maw, 52
 — *v.* Payne, 21, 22, 240
 Embrey *v.* Owen, 181, 182
 Emerson *v.* Davies, 290, 297
 Emperor of Austria *v.* Day, 7, 8, 342
 Empress Engineering Co., *Re*, 491
 Empringham *v.* Short, 600
 England, Bank of, *v.* Anderson, 536
 — *v.* Booth, 537
 — *v.* Moffat, 529
 England *v.* Carling, 448
 English *v.* Vestry of Camberwell, 555
 Ennor *v.* Barwell, 187
 Era Assurance Co., *Re*, 488, 489
 Ernest *v.* Nicholls, 488
 — *v.* Vivian, 16
 Errington *v.* Metropolitan District Rly., 89, 175
 Espley *v.* Wilkes, 222
 Estcourt *v.* Estcourt Hop Essence Co., 347, 354
 Eton College *v.* Great Western Rly., 103
 Eustace *v.* Lloyd, 521
 Evan *v.* Corporation of Avon, 459, 506
 Evans *v.* Coventry, 455, 552
 — *v.* Davies, 374, 552
 — *v.* Hughes, 452
 Evans *v.* Manchester, &c., Rly., 185, 193
 Evelyn's (Lady) case, 67, 74
 Everett *v.* Remington, 372
 Eversfield *v.* Mid-Sussex Rly., 104
 Everitt *v.* Prythergh, 444
 Ewart *v.* Belfast Poor Law Guardians, 194
 — *v.* Cochrane, 188, 200
 Exchange Co. *v.* Central News, 426
 — *v.* Gregory, 426
 Exeter, Corporation of, *v.* Lord Devon, 208
 F. *v.* F., 544
 Fahey *v.* Dwyer, 218
 Fairburn *v.* Household, 441
 Fairclough *v.* Manchester Ship Canal Co., 599
 — *v.* Marshall, 368, 467
 Fairlie *v.* Boosey, 306, 323
 Fairthorne *v.* Weston, 446
 Falcke *v.* Gray, 534
 Fanshaw *v.* London, &c., Dairy Co., 578, 579
 Farbenfabriken *v.* Bowker, 268
 — *v.* Dawson, 263
 Farrant *v.* Lovell, 35, 55, 59, 60, 62
 — *v.* Olmius, 390
 Farrar *v.* Cooper, 450, 538
 — *v.* Farrars, Limited, 464
 Farrow *v.* Vansittart, 214
 Fawcett *v.* Laurie, 478, 480
 Fay *v.* Prentice, 161
 Fearon *v.* Aylesford, 375
 — *v.* Mitchell, 240
 Featherstone *v.* Cooke, 495
 Featherstonhaugh *v.* Lee Moor Porce-lain Clay Co., 487
 Fechter *v.* Montgomery, 360, 402
 Felkin *v.* Herbert, 135, 137
 Fell, *Ex parte*, 464
 Fennall *v.* Brown, 559
 Fenner *v.* Wilson, 568
 Fennessey *v.* Clark, 577
 Fenton *v.* Levy, 452
 Fenwick *v.* Read, 423
 — *v.* East London Rly., 105, 129, 159
 Ferguson *v.* Wilson, 490
 Ferrand *v.* Corporation of Bradford, 201
 — *v.* Hamer, 589
 — *v.* Wilson, 40
 Fewster *v.* Turner, 366
 Field *v.* Carnarvon and Llanberis Rly., 95
 — *v.* Lelean, 366

- Fielden *v.* Lancashire and Yorkshire Rly., 469
 — *v.* Slater, 867, 878, 411
 Fielding *v.* Hawley, 319
 — *v.* Morley Corporation, 576
 Filder *v.* London, Brighton, &c., Rly., 479
 Finch *v.* Earl of Salisbury, 887
 — *v.* Great Western Rly., 214
 Finchley Electric Light Co. *v.* Finchley D. C., 111
 Finck *v.* L. & S. W. Rly., 102, 108, 104
 Firth *v.* Ridley, 899
 Fisher *v.* Apollinaris Co., 546
 — *v.* Jackson, 460, 461
 — *v.* Keane, 502
 — *v.* Prowse, 281
 Fitch *v.* Rochfort, 587
 Fitzwilliam (Lord) *v.* Moore, 65, 245
 Flamang's case, 81
 Flavel *v.* Harrison, 844
 Fleet *v.* Metropolitan Asylums Board, 158
 Fleetwood *v.* Hall, 869
 Fleming *v.* Bishop of Carlisle, 74
 — *v.* Hislop, 140, 157
 — *v.* Snook, 371
 Fletcher *v.* Bealey, 13, 125, 126
 — *v.* Glasgow Gas Commissioners, 257
 — *v.* Great Western Rly., 171, 175
 — *v.* Rodgers, 9, 519, 528
 — *v.* Smith, 196
 Flight *v.* Thomas, 150
 Flint, &c., *Re*, 8
 Flower *v.* Local Board of Low Leyton, 186
 — *v.* London, Brighton, and South Coast Rly., 89
 Fobbing Commissioners *v.* Queen, 209
 Foley *v.* Addenbrooke, 52
 Follett *v.* Jeffreys, 422
 Folsom *v.* Marsh, 291, 298, 480, 483, 484
 Fontaine's case, 568
 Fooks *v.* Wilts, Somerset and Weymouth Rly., 90, 94
 Ford *v.* Foster, 336, 347, 358
 — *v.* Gye, 22
 — *v.* Tennant, 422
 — *v.* Tynte, 44, 68, 69, 70
 Foreign Bondholders *v.* Pastor, 538
 Fores *v.* Johnes, 810
 Forrest *v.* Manchester, Sheffield, and Lincolnshire Rly., 479, 482, 487
 Forrester *v.* Jones, 580
 Fortescue *v.* Lostwithiel, 359
 Foss *v.* Harbottle, 492
 Foster *v.* Birmingham, Wolverhampton, &c., Rly., 358, 416
 Foster *v.* Harrison, 501, 502
 — *v.* Hornsby, 184
 — *v.* London, Chatham and Dover Rly., 474, 475, 476
 — *v.* New Trinidad, &c., Co., 482, 484
 Fothergill *v.* Rowland, 399
 Foundling Hospital *v.* Garrett, 416
 Fowlers *v.* Walker, 158
 Fox *v.* Scard, 881, 886, 892
 Foxwell *v.* Webster, 253
 Fradella *v.* Weller, 28, 29, 825
 Francis *v.* Hayward, 116
 Francome *v.* Francome, 559
 Frankenburg *v.* Great Horseless Carriage Co., 123
 Franklin *v.* Bank of England, 529
 Fraser *v.* Whalley, 479, 498, 565, 566, 585
 Frearson *v.* Loe, 256
 Frechette *v.* St. Hyacinthe, 190
 Freer *v.* Clewes, 159
 Fremington School, *Re*, 460
 French Hoek (Commissioners) *v.* Hugo, 186
 — *v.* Macale, 386, 389, 391
 Frewen *v.* Philipps, 151
 Frewin *v.* Lewis, 85, 126, 138, 469, 509
 Fritz *v.* Hobson, 210, 225, 235, 588
 Frogley *v.* Lord Lovelace, 398
 Frompton *v.* Tiffin, 232
 Fuller *v.* Blackpool Co., 308
 — *v.* Taylor, 565, 566
 Fullwood *v.* Fullwood, 19, 27, 269, 333, 348, 591
 Furness Rly. *v.* Smith, 359
 Fynn, *Re*, 542
 GADD *v.* Manchester Corporation, 855
 Gale *v.* Abbott, 19, 27, 33, 84, 121, 149
 — *v.* Bates, 371, 395
 — *v.* Reed, 378
 Galloway *v.* Mayor, &c., of London, 88, 90
 Galsworthy *v.* Strutt, 389
 Gambart *v.* Bull, 309
 — *v.* Sumner, 310
 Gann *v.* Fishers of Whitstable, 206
 Garbutt *v.* Fawcus, 10, 517
 Gard *v.* Commissioners of Sewers, 110
 Gardiner *v.* Griffith, 465
 Gardner *v.* Broadbent, 252
 — *v.* Charing Cross Rly., 97
 — *v.* Hodgson's Kingston Breweries Co., 186, 218

- Gardner *v.* Jay, 577
 — *v.* M'Cutcheon, 447
 — *v.* Marshall, 575
 Garrett *v.* Banstead and Epsom Rly., 358, 359
 Garth *v.* Cotton, 55, 71, 72, 74, 76
 Garstin *v.* Asplin, 83
 Gartside *v.* Outram, 421
 Gaskin *v.* Balls, 6, 33, 410, 417
 Gas Light and Coke Co. *v.* St. Mary Abbott's Vestry, 180, 245
 Gaunt *v.* Fynney, 19, 33, 159
 Gaved *v.* Martyn, 184, 187, 188, 191, 192
 Gayford *v.* Moffat, 210, 218, 220
 Gaynor *v.* Gaynor, 540
 Kearns *v.* Baker, 365, 395
 Geary *v.* Norton, 29
 Geddis *v.* Proprietors of Bann Reservoir, 126
 Gee *v.* Pritchard, 432—434
 General Accident Association Co. *v.* Noel, 391, 392
 — Auction Co. *v.* Smith, 439
 — Reversionary, &c., Co. *v.* General Reversionary Co., 385
 Gent *v.* Harrison, 78
 Gent-Davis *v.* Harris, 600
 Gerard *v.* Cooke, 214
 — (Lord) and L. & N. W. Rly., *Re*, 174
 German *v.* Chapman, 362, 372
 German Date Coffee Co., *Re*, 488
 Germ Milling Co. *v.* Robinson, 253, 267
 Gerrard *v.* O'Reilly, 27, 387, 390
 Gervais *v.* Edwards, 356
 Gibson *v.* Goldsmid, 356
 — *v.* Ross, 460, 461
 — *v.* Smith, 35, 36
 Giles *v.* Hart, 381
 — *v.* London, Chatham, and Dover Rly., 97
 Gill *v.* Dickinson, 169
 — *v.* Newton, 462
 Gillingham *v.* Beddow, 451
 Gladdon *v.* Stoneman, 444
 Gladstone *v.* Musurus Bey, 7, 538
 — *v.* Ottoman Bank, 7, 10
 Glamorgan Coal Co. *v.* S. Wales Miners, 243
 Glascott *v.* Lang, 2, 519, 538
 Glasse *v.* Marshall, 529, 537
 Glassington *v.* Thwaites, 448, 454
 Glave *v.* Harding, 147, 148
 Glennie *v.* Imri, 359
 Glenny *v.* Smith, 329, 335
 Glossop *v.* Heston, &c., Board of Health, 203
 Glover *v.* Coleman, 150
 Godfrey *v.* Watson, 59
 Godwin *v.* Schweppes, 147
 Goldsmid *v.* Tunbridge Wells Commissioners, 18, 124, 188, 189, 201, 202
 Goldsmid *v.* Russell, 529
 Goldstone *v.* Williams, Deacon & Co., 422
 Gonty *v.* M. S. & L. Rly., 475, 476
 Gooch *v.* London Banking Association, 537
 — *v.* Marshall, 572, 594
 Goodale *v.* Goodale, 537
 Goodfellow *v.* Prince, 330, 336, 342
 Goodhart *v.* Hyett, 13, 201, 221
 Goodman *v.* Kine, 60, 551
 — *v.* Whitecombe, 453
 Goodright *v.* Vivian, 41
 Goodson *v.* Richardson, 32, 33, 34, 114, 232
 Goodtitle *v.* Alker, 232
 Goodwin *v.* Fielding, 534
 Goold *v.* Great Western Deep Coal Co., 46
 Goose *v.* Bedford, 159
 Gophir Diamond Co. *v.* Wood, 379
 Gordon *v.* Cheltenham Rly., 18
 Gordon *v.* St. Mary Abbots, 110
 Gorges *v.* Stanfield, 43
 Goring *v.* Goring, 49
 Gort (Lady) *v.* Clark, 159
 Gorton *v.* Smart, 157, 374
 Goubaud *v.* Wallace, 235
 Goulard *v.* Lindsay, 443
 Gounod *v.* Wood, 421
 Gout *v.* Aleploglu, 419
 Gouthwaite *v.* Ripon, 563
 Gower *v.* Couldridge, 123
 Gower *v.* Eyre, 43
 Grace *v.* Newman, 288, 290
 Grafton *v.* Watson, 320
 Graham *v.* Campbell, 556, 567, 592
 — *v.* Maxwell, 521
 Granard, Earl of, *v.* Dunkin, 433
 Grand Canal Co. *v.* McNamee, 36, 50
 Grand Junction Canal Co. *v.* Dimes, 551, 598
 — *v.* Petty, 476
 — *v.* Shugar, 32, 110, 123, 126, 134, 136, 135, 195, 200
 Grand Junction Waterworks *v.* Hampton D. C., 5, 8, 133
 Graveley *v.* Barnard, 20, 377, 381, 385
 Graves *v.* Ashford, 309, 310
 — *v.* Mercer, 277
 Graves' case, 311—313
 Gray *v.* Lewis, 491, 493, 495

- Gray *v.* Liverpool and Bury Rly., 108
 Great Eastern Rly. *v.* Goldsmid, 287, 289, 240
 Great Northern Rly. *v.* Eastern Counties Rly., 106, 488, 491
 ——— *v.* Harrison, 865
 ——— *v.* East and West India Docks, &c., Co., 107
 Great Northern and City Rly. *v.* Tillett, 99
 Great North of England Rly. *v.* Clarence Rly., 114, 244
 Great North-West Central Rly. *v.* Charlebois, 478
 Greatrex *v.* Greatrex, 418, 449
 ——— *v.* Hayward, 191
 Great Western Rly. *v.* Bennett, 170, 172, 174
 ——— *v.* Birmingham and Oxford Junction Rly., 2, 896
 ——— *v.* Blades, 171
 ——— *v.* Cefu Cribbwr Brick Co., 167, 178
 ——— *v.* Metropolitan Rly., 470, 482, 486
 ——— *v.* Oxford, Worcester, &c., Rly., 15, 16, 19, 479, 574
 ——— *v.* Rushout, 479, 485, 493
 ——— *v.* Swindon, &c., Rly., 98
 Green *v.* Cole, 89, 50, 51
 ——— *v.* Green, 540
 ——— *v.* Knight, 445
 ——— *v.* Pledger, 116, 586
 ——— *v.* Prior, 559
 ——— *v.* Pulsford, 589
 ——— *v.* Rutherford, 518
 Greenhalgh *v.* Manchester and Birmingham Rly., 16, 21
 Greenough *v.* Gaskell, 421
 Greenwell *v.* Low Beeckburn Coal Co., 169, 170
 Greenwich Board of Works *v.* Maudsley, 281
 Greenwich Hospital Commissioners *v.* Blackett, 59
 Greenwood, *Re*, 545
 Greenwood *v.* Hornsey, 82, 152, 582
 Greer *v.* Bristol Tanning Co., 266, 566
 Greville-Nugent *v.* Mackenzie, 44
 Grey, *Re*, 544
 Grey *v.* Duke of Northumberland, 47
 Grey de Wilton *v.* Saxon, 871
 Grierson *v.* Cheshire Lines Committee, 98
 ——— *v.* Eyre, 76
 Griffies *v.* Griffies, 77
 Griffith *v.* Blake, 569, 584, 592
 ——— *v.* Tower Publishing Co., 289
 Grimston *v.* Cunningham, 402, 408
 Grose *v.* West, 282
 Grosvenor *v.* Hampstead Junction Rly., 98
 Grosvenor Hotel *v.* Hamilton, 167
 Guardian Fire and Life Insurance Co. *v.* Guardian and General Insurance Co., 385, 354
 Guichard *v.* Mori, 291
 Guinness *v.* Fitzsimons, 115
 ——— *v.* Ulmer, 842
 Gullick *v.* Tremlett, 156, 157, 159
 Gurnell *v.* Gardner, 467
 Gurney *v.* Behrends, 569
 ——— *v.* Longman, 802
 Guyot *v.* Thomson, 248
 Gwynne *v.* Drysdale, 261
 Gyles *v.* Wilcox, 298
 Gynn *v.* Gilbard, 542
 HACKETT *v.* Baiss, 571
 Hadley *v.* London Bank of Scotland, 417, 418
 Haigh and L. & N. W. Rly., *Re*, 589
 ——— *v.* Waterman, 872
 ——— *v.* West, 229
 Haines *v.* Taylor, 18, 24, 125, 126
 Haley *v.* Hammersley, 53, 54
 Halford *v.* Hardy, 594
 Halifax *v.* Chambers, 49
 Hall, *Ex parte*, 592
 ——— *v.* Barrows, 389, 346
 ——— *v.* Byron, 48
 ——— *v.* Corporation of Bootle, 228
 ——— *v.* Ewin, 867, 412
 ——— *v.* Hall, 447
 ——— *v.* Lichfield Brewery Co., 154
 ——— *v.* Lund, 146, 166, 199
 ——— *v.* Norfolk (Duke), 170
 ——— *v.* Swift, 189, 190
 ——— *v.* Trigg, 594, 596
 Hallam *v.* Vernon, 384
 Halliwell *v.* Philipps, 68, 69, 71
 Halsey *v.* Brotherhood, 438, 440
 Hamilton *v.* Board, 559, 567
 ——— *v.* Dunsford, 871, 400, 402
 ——— *v.* Hector, 356, 398, 429, 540, 542
 ——— (Duke of) *v.* Graham, 214, 215
 Hammersmith Rly. *v.* Brand, 128, 181
 Hammond *v.* Bruncker, 388

- Hammond *v.* Maundrell, 580
 — *v.* Smith, 585
 Hamp *v.* Robinson, 552
 Hampden *v.* Buckinghamshire (Earl),
 487, 536
 — *v.* Wallis, 596
 Hampson *v.* Price's Patent Candle Co.,
 498
 Hampton *v.* Hodges, 60
 Hanbury *v.* Cundy, 381, 391
 Hanfstaengl *v.* American Tobacco Co.,
 321, 324
 — *v.* Baines, 308
 — *v.* Empire Theatre, 315
 Hanmer *v.* Chance, 47
 Hanna *v.* Pollock, 191
 Hanson, *Re*, 380
 — *v.* Derby, 59
 Harben *v.* Philipps, 492, 494
 Harbidge *v.* Warwick, 149, 150
 Harcourt *v.* Ramsbottom, 463
 Harding *v.* Metropolitan Railway Co.,
 94
 — *v.* Pingey, 462, 598, 597
 — *v.* Wilson, 211
 Hardinge *v.* Southborough Local Board,
 186
 Hardman *v.* Holberton, 159
 Hardy *v.* Martin, 386
 Hare *v.* London and North Western
 Rly., 470, 480, 490
 Hargreaves *v.* Freeman, 382
 Hargrove *v.* Congleton, 47
 Harland *v.* Binks, 458
 Harman *v.* Jones, 12, 20
 Harmer *v.* Plane, 264
 Harms *v.* Parsons, 373, 382
 Harness' Trade Mark, 337
 Harper *v.* Aplin, 60
 — *v.* Pearson, 335
 — *v.* Wright, 319
 Harrington *v.* Sendall, 504
 Harrison *v.* Rutland (Duke), 84, 226, 282
 Harris *v.* Beauchamp Bros., 3
 — *v.* De Pinna, 149, 151, 154, 155,
 218
 — *v.* Ekins, 77
 — *v.* Gandy, 520
 — *v.* Jenkins, 211
 — *v.* Jose, 137, 520
 — *v.* Lewis, 557
 — *v.* North Devon Rly., 492
 — *v.* Ryding, 46
 Harrison *v.* Anderston Foundry Co.,
 280
 — *v.* Cockerell, 444, 556
 — *v.* Gardner, 386, 450
 — *v.* Goode, 80, 117, 124, 372,
 410, 413
 — *v.* Gurney, 522, 525
 Harrison *v.* Mexican Rly., 489
 — *v.* Rutland (Duke), 84, 226,
 282
 — *v.* Southwark, &c., Co., 105,
 129
 — *v.* Taylor, 28, 353
 Harrop *v.* Hirst, 201
 — *v.* Ossett (Mayor), 576
 Hart *v.* Herwig, 533
 Hartlepool Gas Co. *v.* West Hartlepool,
 &c., Rly., 552
 Hartz *v.* Schrader, 449
 Harvey *v.* Ferguson, 79
 — *v.* Hall, 589
 — *v.* Walters, 161, 189
 Harvie *v.* South Devon Rly., 97
 Hastings *v.* Whittey, 379
 — Corporation of, *v.* Ivall, 244
 Hattersley *v.* Lord Shelburne, 490, 492
 Hatton *v.* Kean, 305
 Hawes *v.* Bamford, 559
 — *v.* James, 533
 Hawkins *v.* Blachford, 454
 — *v.* Gardiner, 552
 — *v.* Hawkins, 449
 Hawley *v.* Steele, 137, 162
 Hawthornthwaite *v.* Russell, 444
 Hayles *v.* Pease, 46, 168
 Hayman *v.* Governors of Rugby School,
 460
 Haynes *v.* Donan, 377, 385
 — *v.* Haynes, 92, 94
 — *v.* Young, 381
 Hayward *v.* East London Waterworks
 Co., 205
 — *v.* Hayward, 6
 — *v.* Lely, 277, 286, 345
 Hayward & Co. *v.* Hayward & Sons,
 439
 Haywards' Trade Mark, *Re*, 337
 Haywood *v.* Brunswick Permanent,
 &c., Society, 412
 — *v.* Richards, 156
 Healey *v.* Corporation of Batley, 229
 Heap *v.* Hartley, 248
 Hearn *v.* Tennant, 594
 Heath *v.* Maydew, 126
 Heathcote *v.* North Staffordshire Rly.,
 9, 392, 393
 Heather *v.* Pardon, 160
 Hecla Foundry *v.* Walker, 321
 Heddy *v.* Wheelhouse, 238, 239
 Hedges *v.* Metropolitan Rly., 93, 101
 Hedley *v.* Bates, 5
 Hemphill *v.* M'Kenna, 235
 Henderson *v.* Bank of Australasia, 493
 — *v.* Maxwell, 286, 287
 Hendriks *v.* Montagu, 335
 Hennessey *v.* Bohman, 344, 581
 Henning *v.* Burnett, 213, 215, 216

- Henry v. Great Northern Rly., 484
 Hepburn v. Lordan, 82, 162
 Hepworth v. Pickles, 861
 Hereford (Bishop of) v. Griffin, 800, 801
 Heriot v. Nicholas, 401
 Heriot's Hospital, Feoffees of, v. Gibson, 866
 Hermann Loog, *Re*, 528
 — v. Bean, 6, 81, 488, 546
 Herring v. Cloberry, 421
 — v. Dean and Chapter of St. Paul's, 89, 68, 65
 Herron v. Rathmines, 102
 Hersey v. Young, 551
 Hertford, *Ex parte*, 580, 581
 Hertz v. Union Bank of London, 565
 Hervey v. Smith, 81, 84, 162
 Hext v. Gill, 14, 46, 48, 168, 552
 Heywood v. Potter, 819
 — v. Wait, 594
 Hickman v. Isaacs, 874
 — v. Maisey, 84, 226, 227
 Hickson v. Darlow, 468
 Higginbotham v. Hawkins, 76, 78
 Higgins and Hitchman, *Re*, 477
 Higgs' case, *Re*, 489
 Higgs v. Goodwin, 257
 Higham v. Rabett, 219
 Hildesheimer v. Dunn, 285
 Hill v. Barry, 47
 — v. Cock, 190
 — v. Kirkwood, 468
 — v. Midland Rly., 93
 — v. Rimmell, 556, 585
 Hill v. South Staffordshire Rly., 17
 — v. Thompson, 252, 268
 — v. Tupper, 122
 — v. Wallasey L. B., 90
 Hill & Co. v. Hill, 878
 Hilliard v. Hanson, 585, 575
 Hilton v. Eckersley, 248
 — v. Lord Granville, 2, 12, 15, 21, 23, 87, 169
 Hind v. Whitmore, 574
 Hinde v. Gray, 876
 Hine v. Lart, 889
 Hipkins v. Plant, 354
 Hipplesley v. Spencer, 60
 Hirsch v. Jonas, 842, 850
 Hitchcock v. Coker, 879, 880, 881, 885
 Hoare v. Dresser, 405
 Hobbs v. Midland Rly., 476
 Hobhouse v. Hamilton, 428
 Hobson v. Gorrington, 54
 — v. Tulloch, 872
 Hoby v. Grosvenor Library, 384
 Hodgkinson v. Ennor, 185
 — v. National Live Stock Insurance Co., 488
 Hodgson v. Kynoch, 352
 — v. Lord Powis, 482
 Hodson v. Coppard, 872, 558
 Hoffman v. Postill, 254
 Hogg v. Darley, 384, 425
 — v. Kirby, 840
 — v. Scott, 19, 27, 278, 280, 297
 Holden v. Waterlow, 575
 — v. Weekes, 64
 Holdsworth v. Macrae, 818, 820, 826
 Hole v. Bradbury, 277, 287, 289, 825, 826
 — v. Thomas, 71
 Holford v. Acton Urban Council, 866, 407, 410
 Holker v. Porritt, 180, 198
 Holland v. Dickson, 477
 — v. Hodgson, 54
 — v. Worley, 81, 582
 Hollinrake v. Truswell, 285, 291
 Hollins v. Verney, 150, 160, 218
 Holloway v. Hill, 406, 411
 — v. Holloway, 883, 847
 Holme v. Guy, 461
 Holmes v. Eastern Counties Rly., 871, 859, 896, 400, 402
 — v. Goring, 222
 — v. Upton, 115
 Holophane v. Berend, 265
 Holroyd v. Marshall, 467
 Holt & Co. v. Collyer, 878
 Holyoake v. Shrewsbury and Birmingham Rly., 88, 108, 478
 Home and Colonial Stores v. Colls, 88, 141, 144, 154
 Homer v. Ashford, 376
 Honeywood v. Honeywood, 89, 40
 Hood v. Aston, 449, 586
 — v. Easton, 59
 — v. North Eastern Rly., 414, 416
 Hookham v. Pottage, 835, 839, 450
 Hoole v. Great Western Rly., 478, 480
 Hooley, *Re*, 599
 Hooper v. Brodrick, 396
 Hope v. Carnegie, 6, 524, 595, 598, 599
 — v. Corporation of Gloucester, 368
 — v. Hope, 8, 399
 — v. International Finance Society, 488
 Hopkins v. Great Northern Rly., 287
 Hopkinson v. Lord Burghley, 438
 — v. St. James' Co., 274
 Horner v. Flintoff, 388
 — v. Graves, 880, 881
 — v. Whitechapel Board of Works, 287
 Horsburgh, *Re*, 381
 Hotten v. Arthur, 276, 282, 290, 296, 297
 — v. Newsagents' Co., 291

- Houldsworth *v.* Evans, 480, 481
 House Property, &c., Co. *v.* Horse Nail Co., 122
 Howard *v.* Gun, 438
 — *v.* Hopkins, 389, 391
 — *v.* Papera, 444
 — *v.* Sykes, 443
 — *v.* Woodward, 381
 Howarth *v.* Armstrong, 176
 Howden *v.* Yorkshire Miners' Ass., 505
 Howe *v.* M'Kernan, 253
 Howitt *v.* Hall, 288, 289, 300
 Howley *v.* Jebb, 42, 46, 47
 Hubbuck *v.* Wilkinson, 489
 Hudson *v.* Cripps, 410
 — *v.* Maddison, 121, 277
 — *v.* Osborne, 388, 346
 — *v.* Osgerby, 81
 — *v.* Tabor, 209
 — *v.* Walker, 597
 Hudson's Executors, *Re*, 329, 330
 Hughes *v.* Chester and Holyhead Rly., 218
 — *v.* Percival, 177
 Huguenin *v.* Baseley, 1
 Humphreys *v.* Harrison, 40, 60
 — *v.* Roberts, 553
 Humphries *v.* Brogden, 163
 — *v.* Cousins, 161
 Hunt *v.* Browne, 50
 — *v.* Chambers, 577, 580
 — *v.* Hunt, 374, 375, 567, 569
 — *v.* Peake, 113, 163
 Hunter *v.* Nickholds, 551
 Huntley *v.* Russell, 88, 44, 64
 Hurdman *v.* North Eastern Rly., 162
 Hussey *v.* Hussey, 57
 Hutchins *v.* Sheard, 291
 Hutchins and Romer, *Ex parte*, 305
 Hutchinson *v.* Pattulo, 262
 Hutton *v.* Hepworth, 567
 — *v.* London and South Western Rly., 95, 132
 — *v.* Scarborough Cliff Hotel Co., 489
 — *v.* Warren, 49, 366
 — *v.* West Cork Rly., 493
 Huzzey *v.* Field, 236
 Hyman *v.* Helm, 9, 525

 ILLIE *v.* Henshaw, 341
 Illingworth *v.* Manchester and Leeds Rly., 138
 Imperial Gas Co. *v.* Broadbent, 20, 25, 26, 116, 125, 126, 132
 Imperial Hydropathic Hotel Co. *v.* Hampson, 492, 496

 Incandescent Gaslight Co. *v.* Brogden, 256, 259
 Incandescent Gaslight Co. *v.* New Incandescent Co., 258
 Inchbald *v.* Robinson, 121, 159
 Inge *v.* Birmingham, Wolverhampton, &c., Rly., 95
 Ingram *v.* Stiff, 23, 358, 371
 Inland Revenue Commissioners *v.* Muller & Co., 452
 Innes *v.* Short, 258
 Innocent *v.* North Midland Rly., 18
 International Pulp, &c., Co., *Re*, 528
 Isaacs *v.* Fiddeman, 326
 Isaacson *v.* Thompson, 347
 Isenberg *v.* East India House Estate Co., 32
 Isherwood *v.* Oldknow, 369
 Isle of Wight Rly. *v.* Tahourdin, 493
 Islington Vestry *v.* Hornsey D. C., 135, 136, 189, 202, 203, 204, 513, 590
 Iven *v.* Elwes, 365
 Ives *v.* Willans, 539
 Iveson *v.* Harris, 552, 598
 Ivimey *v.* Stocker, 188, 191

 J. — *v.* S. —, 450
 Jackson *v.* Barry Rly., 539
 — *v.* Cassidy, 560
 — *v.* Cator, 14
 — *v.* Munster Bank, 495
 — *v.* Newcastle (Duke), 121, 124, 140, 141, 142
 — *v.* Normanby Brick Co., 81, 417
 — *v.* Stacey, 216
 — *v.* Stanhope, 83
 — *v.* Winiffrith, 363, 409
 Jacobs *v.* M'Sheehan, 145
 Jacoby *v.* Whitmore, 379
 Jacomb *v.* Knight, 32, 142
 James *v.* Cochrane, 365
 — *v.* Lovel, 88
 — *v.* Plant, 211, 224
 James' Trade Mark, *Re*, 330
 Jamieson *v.* Jamieson, 333
 — *v.* Teague, 375
 Jarrrah Timber Co. *v.* Samuel, 468
 Jarrold *v.* Heywood, 290, 297
 — *v.* Houlstone, 281, 282, 290, 296, 297
 Jarvis *v.* Dean, 227, 230
 Jay *v.* Ladler, 330
 — *v.* Richardson, 406
 Jefferys *v.* Boosey, 283, 284, 288, 310, 427, 429
 Jegon *v.* Vivian, 113
 Jenkins *v.* Bushby, 577—579

- Jenkins *v.* Gething, 58
 — *v.* Herries, 584
 — *v.* Hope, 29, 270, 278, 578
 — *v.* Jones, 462, 463, 465, 466
 Jenks *v.* Clifden, 51
 Jennings *v.* Brighton, &c., Sewer Board, 588
 — *v.* Jennings, 888, 451, 458
 Jersey (Earl) *v.* Neath Union, 46
 Jervis *v.* White, 449
 Jesus College *v.* Bloom, 75, 76
 Job *v.* Potton, 56, 77
 John (Brothers) *v.* Holmes, 869, 406
 Johns *v.* James, 457, 458
 Johnson *v.* Edge, 440
 — *v.* Lyttle's Iron Agency Co., 477
 — *v.* Newnes, 285, 302
 — *v.* Raylton, 850
 — *v.* Shrewsbury and Birmingham Rly., 14, 860, 899
 — *v.* Wyatt, 18, 26, 141
 Johnston *v.* Courts of Justice Chambers, 34
 — *v.* Orr Ewing, 842, 849, 850
 Johnstone *v.* Crompton, 46
 — *v.* Hall, 121, 861, 869, 872, 412
 — *v.* Symons, 50
 Jolly *v.* Wimbledon and Dorking Rly., 101
 Jones *v.* Batten, 575
 — *v.* Bone, 873
 — *v.* Chappell, 88, 50, 121
 — *v.* Geddes, 525
 — *v.* Gibbons, 865, 866
 — *v.* Great Western Rly., 22
 — *v.* Heavens, 878
 — *v.* Latimer, 565
 — *v.* Lees, 378, 384
 — *v.* Lloyd, 446
 — *v.* Pearce, 266
 — *v.* Powell, 157
 — *v.* Stanstead Rly., &c., 128, 237
 — *v.* Tapling, 195, 207
 — *v.* Thorne, 874
 Jordeson *v.* Sutton, 15, 32, 129, 181, 184, 164, 165, 193, 195, 471
 Josselyn *v.* Parson, 379
- KAY *v.* Oxley, 211, 212
 Kaye *v.* Chubb, 278
 — *v.* Croydon Tramways, 498, 495
 Kearns *v.* Cordwainers' Co., 207
 Keates *v.* Lyon, 408, 409
 — *v.* Woodward, 11
 Kekewich *v.* Marker, 60, 66, 78
 Kelk *v.* Pearson, 82, 88, 140, 142, 145, 146
- Kelly *v.* Byles, 287, 298, 340
 — *v.* Hodge, 326
 — *v.* Hooper, 280, 326
 — *v.* Hutton, 389
 — *v.* Morris, 279, 290, 295, 296
 — *v.* Wyman, 277
 Kelsey *v.* Dodd, 19, 362, 417
 Kemble *v.* Farren, 388
 Kemp *v.* Bird, 866, 407
 — *v.* London, Brighton, &c., Rly., 85, 91, 105
 — *v.* Sober, 62, 372
 — *v.* South Eastern Rly., 89, 92
 — *v.* West End, &c., Rly., 91, 102
 Kennedy *v.* De Trafford, 464
 Kenrick *v.* Danube Collieries Co., 429
 Kensit *v.* Great Eastern Rly., 179, 180, 186
 Kent Coalfields Syndicate, *Re*, 477
 Kent *v.* Jackson, 480
 Kenworthy *v.* Accunor, 559
 Kernaghan *v.* Williams, 483
 Kernot *v.* Potter, 356, 357
 Kerr *v.* Mayor, &c., of Preston, 7
 Kershaw *v.* Kalow, 463
 Kilbey *v.* Haviland, 414
 Kilmorey (Lord) *v.* Thackeray, 414
 Kimber *v.* Admans, 372
 Kimberley *v.* Jennings, 860
 Kimpton *v.* Eve, 43, 50, 61, 395, 572
 King *v.* Hansell, 377
 — *v.* Malcott, 445
 — *v.* Smith, 60
 — *v.* Wycombe Rly., 93, 97, 98
 King & Co., *Re*, 561
 Kingham *v.* Lee, 56
 Kinnaird *v.* Trollope, 462
 Kino *v.* Rudkin, 141, 148, 584
 Kirby *v.* Harrowgate, 98, 96, 181
 Kirk *v.* Bromley Union, 359
 — *v.* Todd, 552
 Kitcat *v.* Sharpe, 548
 Kitts *v.* Moore, 5, 7, 450, 539
 Knapp *v.* London, Chatham, and Dover Rly., 96
 Knight *v.* Duplessis, 40
 — *v.* Moseley, 63, 64, 77
 — *v.* Pursell, 80, 178
 — *v.* Simmonds, 18, 362, 374
 — *v.* Woore, 219
 Knowles *v.* Bennett, 320
 Knox *v.* Samson, 215
 Krehl *v.* Burrell, 32, 211, 582
 Kyshe *v.* Alturas Gold Co., 478, 497
- LABOUCHERE *v.* Lord Wharnccliffe, 501, 502
 La Compagnie de Mayville *v.* Whitley, 496

- Lacy *v.* Rhys, 805
 — *v.* Toole, 288, 305
 Lade *v.* Shepherd, 282
 Ladyman *v.* Grave, 151, 152
 Laing *v.* Whaley, 199
 Laird *v.* Birkenhead Rly., 17
 — *v.* Briggs, 210
 Lamb *v.* Evans, 802, 420, 426
 Lambert *v.* Addison, 502
 — *v.* Lowestoft Corporation, 126, 204
 — *v.* Northern Buenos Ayres Rly., 498
 Lambton *v.* Mellish, 123, 225
 Lampon *v.* Corke, 364
 Lancashire and Yorks Rly. *v.* Knowles, 170
 Lancaster and Carlisle Rly. *v.* North Western Rly., 892, 898
 Lane *v.* Barton, 554
 — *v.* Newdigate, 81, 414, 571
 — *v.* Sterne, 600
 Lanfranchi *v.* Mackenzie, 143
 Lang *v.* Purves, 459, 507
 Langham *v.* Great Northern Rly., 555
 Langley, *Ex parte*, 572, 594, 595, 599, 600
 — *v.* Hammond, 212
 Lansdowne *v.* Lansdowne, 76
 Large *v.* Alton, 245
 Latimer *v.* Aylesbury, &c., Rly., 108
 Lauri *v.* Renad, 277, 307, 322, 323
 Law *v.* Redditch Local Board, 388, 389
 Lawes *v.* Purser, 265
 Lawrance *v.* Norreys, 518
 Lawrence *v.* Great Northern Rly., 198
 — *v.* Horton, 38
 — *v.* Smith, 278, 292, 431
 Lawton *v.* Lawton, 52, 53
 Lazarus *v.* Charles, 318
 Lea *v.* Saxby, 254
 — *v.* Whittaker, 387
 Leader *v.* Moody, 395, 412, 417
 — *v.* Purday, 277, 288
 Leake *v.* Beckett, 61, 551
 Leamy *v.* Waterford and Limerick Rly., 236
 Leas Hotel Co., *Re*, 465
 Leather Cloth Co. *v.* American Cloth Co., 328, 329, 344—346
 — *v.* Hirschfield, 353
 — *v.* Lorisont, 344, 377, 384, 425
 Lechmere Charlton's case, 599
 Lee *v.* Alston, 42, 43, 77
 — *v.* Gibbings, 340
 — *v.* Haley, 384, 344, 348
 Lee *v.* Milner, 88, 94
 — *v.* Neuchatel Asphalte Co., 482
 — *v.* Risdon, 53
 — *v.* Stevenson, 199
 Lee Conservancy Board *v.* Button, 288
 Leech *v.* Schweder, 142, 146
 Leeds (Duke of) *v.* Lord Amherst, 38, 76, 78
 Legh *v.* Heald, 41
 Lehmann *v.* Macarthur, 17
 Leicester, *Ex parte*, 561
 Leigh *v.* Hewitt, 49
 — *v.* Hind, 384
 — *v.* Jack, 231
 — *v.* Taylor, 53, 54
 Leighton *v.* Wales, 377, 383
 Leith Council *v.* Leith Harbour, &c., 394, 509, 511
 Lemaitre *v.* Davis, 176
 Lemann *v.* Berger, 449
 Le May *v.* Welch, 317
 Lempriere *v.* Lange, 538
 Lennie *v.* Pillans, 290, 296
 Leonard and Ellis' Trade Mark, *Re*, 381, 386
 Leslie *v.* Young, 280, 290, 296
 Letton *v.* Gooden, 285, 236
 Lever *v.* Goodwin, 352
 Levinger *v.* Crombie, 467
 Levy *v.* Rutley, 288, 304
 — *v.* Walker, 338
 Lewes (Lord) *v.* Barnett, 536
 Lewis *v.* Fullerton, 279, 281, 290, 296
 — *v.* Langdon, 339
 — *v.* Smith, 420, 422
 — *v.* Weston - super - Mare Local Board, 88, 90
 Leybourne-Popham *v.* Spencer-Brown, 448
 Leyland *v.* Stewart, 287
 Licensed Victuallers' Gazette *v.* Bingham, 340
 Lifford's case, 39, 220
 Lingwood *v.* Stowmarket Co., 201
 Linoleum Manufacturing Co. *v.* Nairn, 336
 Lisle *v.* Reeve, 468
 List *v.* Sharp, 178
 Lister *v.* Eastwood, 263
 — *v.* Leather, 562
 — *v.* Lobley, 95
 — *v.* Norton, 253
 Litchfield *v.* Jones, 596
 Little *v.* Kingswood Collieries Co., 422, 423, 424
 — *v.* Newport and Hereford Rly., 102
 Littler *v.* Thompson, 43, 600
 Littlewood *v.* Caldwell, 454

- Liverpool (Mayor, &c., of) *v.* Chorley Waterworks Co., 469, 471, 478, 589
 — &c., Stores Association, *Re*, 488
 — &c., Stores Association *v.* Smith, 487, 488
 Livingstone *v.* Rawyard Coal Co., 118
 Llandudno U. C. *v.* Woods, 6, 123, 210, 226, 244, 591
 Llanelly Rly. *v.* London and North Western Rly., 106
 Llewellyn, *Re*, 40
 Lloyd *v.* Gordon, 556
 — *v.* London, Chatham, and Dover Rly., 862, 872, 418, 414
 Lynvi Co. *v.* Brogden, 112, 118
 Lockhart *v.* Hardy, 462
 Loder *v.* Arnold, 598
 Logan *v.* Wienholt, 889
 Lomax *v.* Stott, 196
 London Ass. of Shipowners *v.* London and Tilbury Docks, 87
 — (Bishop of) *v.* Webb, 71
 — (City of) *v.* Graeme, 50
 — (City of) Brewery Co. *v.* Tennant, 82, 141, 143, 154
 — County Council *v.* Att.-Gen., 478, 507, 509
 — County Council *v.* Pryor, 111
 — (Mayor, &c., of) *v.* Hedger, 51, 398
 — (Mayor, &c., of) *v.* Riggs, 221
 — and Birmingham Rly. *v.* Grand Junction Canal Co., 204, 244, 298
 — and Blackwall Rly. *v.* Cross, 6, 188
 — and Blackwall Rly. *v.* Limehouse Board of Works, 568
 — and Brighton, &c., Rly. *v.* Truman, 128, 162
 — and County Banking Co. *v.* Lewis, 467, 588
 — and Northern Bank *v.* Newnes, 489
 — and North Western Rly. *v.* Ackroyd, 172
 — and North Western Rly. *v.* Evans, 167, 168, 178
 — and North Western Rly. *v.* Garnett, 878
 — and North Western Rly. *v.* Lancashire and Yorkshire Rly., 114
 — and North Western Rly. *v.* Price, 470
 — and North Western Rly. *v.* Westminster, 281
 London and South Western Rly. *v.* Coward, 188
 — and South Western Rly. *v.* Gomm, 406, 411, 412
 — and Suburban Land, &c., Co. *v.* Field, 378
 — and Yorkshire Banking Co. *v.* Pritt, 386, 387
 — Chatham, and Dover Rly. *v.* Bull, 19, 27, 416
 — Printing Alliance *v.* Cox, 814
 — Stereoscopic Co. *v.* Kelly, 813
 Londonderry *v.* Russel, 348
 Longbottom *v.* Berry, 54
 Longman *v.* Winchester, 290
 Loosemore *v.* Tiverton, &c., Rly., 95, 97
 Lord *v.* Copper Mining Co., 491
 — *v.* Commissioners of Sidney, 41, 179
 Losh *v.* Hague, 247, 252, 266
 Louis *v.* Smellie, 426
 Lovatt (Lord) *v.* Duchess of Leeds, 40
 Love *v.* Bell, 165, 168, 169
 Lovell *v.* Smith, 224
 Lover *v.* Davidson, 286, 805
 Lovett, *Re*, 445
 Low *v.* Innes, 22, 360, 400, 571
 — *Re*, 521
 — *v.* Routledge, 286, 288
 — *v.* Staines Reservoir, 98
 — *v.* Ward, 280, 288
 Lowndes *v.* Bettle, 25, 87, 81, 82, 84, 116
 — *v.* Norton, 40
 Lucas *v.* Cooke, 277, 809, 812
 — *v.* Williams, 282
 Ludlow, *Ex parte*, 43
 Luker *v.* Dennis, 381
 Lumley *v.* Metropolitan Rly., 878
 — *v.* Ravenscroft, 859
 — *v.* Wagner, 15, 370, 394, 398, 408
 Lurting *v.* Conn, 44
 Luscombe *v.* G. W. Rly., 227
 Lushington *v.* Boldero, 69, 74
 Luttrell's case, 188, 189
 Luxmore, *Re*, 596
 Lybbe *v.* Hart, 371, 395
 Lyddall *v.* Clavering, 56, 57
 Lyde *v.* Russell, 53
 Lynch *v.* Commissioners of Sewers, 93, 110
 Lyndon, *Re*, 380
 Lyon *v.* Fishmongers' Co., 179, 208, 225
 — *v.* Goddard, 272, 274
 — *v.* Newcastle Corporation, 269, 273
 Lyons & Sons *v.* Wilkins, 242
 Lytton *v.* Devey, 482, 488

- M'ANDREW *v.* Bassett, 29, 329, 354
 Macaulay *v.* Shackell, 7, 292
 M'Beath *v.* Ravenscroft, 552
 Macbride *v.* Lindsay, 478, 480, 492
 M'Cabe *v.* Bank of Ireland, 589
 Macclesfield (Mayor of) *v.* Chapman, 288
 M'Curdy *v.* Noak, 564
 Macdonald *v.* Fraser, 261
 M'Donnell *v.* Grand Canal Co., 478
 M'Dougall *v.* Gardiner, 491, 496
 ——— *v.* Jersey Imperial Hotel Co., 482
 McEacharn *v.* Colton, 370, 375
 McEvoy *v.* G. N. Rly., 191
 Macy *v.* Metropolitan Board of Works, 112, 182, 187, 207
 Macfadden *v.* Jenkyns, 456
 Macfarlane *v.* Oak Foundry Co., 292, 347
 McGraith, *Re*, 548
 Macgregor *v.* Metropolitan Rly., 96
 McHenry *v.* Lewis, 520, 522, 525
 McIntosh and Pontypridd Co., *Re*, 898
 Macintyre *v.* Belcher, 364, 365
 McIntyre Brothers *v.* McGavin, 186
 Mackenzie *v.* Childers, 407
 M'Kenzie *v.* M'Kenzie, 457
 McKeown *v.* Joint Stock Institute, 600
 Mackett *v.* Herne Bay Commissioners, 228, 547
 Mackey *v.* Scottish Widows Ins. Co., 143
 Mackie *v.* Solvo Co., 443
 M'Kinnon *v.* Stewart, 457
 MacLaren *v.* Stainton, 523, 527, 587
 Macleod *v.* Jones, 463, 464
 Maclean *v.* Mackay, 364, 365, 407
 ——— *v.* Moody, 290
 Macklin *v.* Richardson, 429
 M'Manus *v.* Cooke, 32, 151, 416
 McNab *v.* Robertson, 193, 194
 M'Neill *v.* Garratt, 572, 594
 ——— *v.* Williams, 22
 Macpherson *v.* Scottish Way, &c., 230
 Macrae *v.* Houldsworth, 319
 Maddock *v.* Blackwood, 28
 Magdalen College *v.* Ward, 429
 Magee *v.* Lovell, 387
 Magnolia Co. *v.* Atlas Co., 341, 343, 353
 Magor *v.* Chadwick, 191, 193
 Mahon (Lord) *v.* Stanhope, 71
 Mair *v.* Himalaya Tea Co., 399
 Maitland *v.* Backhouse, 573
 Maleverer *v.* Spinke, 49
 Mallan *v.* May, 364, 376, 377, 381, 383, 385
 Mallett *v.* Howett, 320
 Malmsbury Rly. *v.* Budd, 539
 Manchester Banking Co. *v.* Parkinson, 568
 ——— *v.* Brewery *v.* Coombs, 369, 373, 381
 ——— *v.* Brewery *v.* North Cheshire, &c., 335, 493
 ——— *v.* Corporation *v.* Lyons, 239
 ——— *v.* Sheffield and Lincolnshire Rly. *v.* Henderson, 181
 ——— *v.* Sheffield and Lincolnshire Rly. *v.* Worksop, 115, 193, 204
 ——— *v.* Ship Canal Co. *v.* Manchester Racecourse Co., 365, 394
 Mander *v.* Falcke, 406, 593, 595
 Mangan *v.* Met. Electric Supply Co., 580
 Manitoba, &c., Land Corp. *v.* Allan, 551
 Mann *v.* Brodie, 228
 ——— *v.* Stephens, 375, 407, 410
 Manners (Lord) *v.* Johnson, 17, 368, 406, 413, 414, 416
 Mansell *v.* British Linen Co., 592
 Manser *v.* Northern and Eastern Counties Rly., 128, 205
 Mansfield *v.* Crawford, 46
 ——— *v.* Shaw, 444
 Manwood's case, 41, 42
 Maple *v.* Junior Army and Navy Stores, 285, 290, 291, 310
 Mapp *v.* Elcock, 588
 Mappin *v.* Liberty, 231
 Mare *v.* Charles, 364
 Marker *v.* Marker, 16, 66, 68, 70
 Marks *v.* Benjamin, 373
 Marlborough (Duke of) *v.* St. John, 63, 64
 Marriott *v.* Reid, 85
 ——— *v.* Tarpley, 65
 Marsack *v.* Reeves, 574
 Marsh *v.* Conquest, 305
 Marshall *v.* Bull, 309
 ——— *v.* Colhill, 561
 ——— *v.* Colman, 453
 ——— *v.* Marshall, 375, 540
 ——— *v.* Ross, 345
 ——— *v.* Sladden, 533
 ——— *v.* South Staffs Tramways, 473
 ——— *v.* Watson, 449, 452
 Martin *v.* Bannister, 11
 ——— *v.* Beauchamp, 589
 ——— *v.* Fust, 563
 ——— *v.* Headon, 140, 142, 143
 ——— *v.* Knowlys, 77
 ——— *v.* London, Chatham, and Dover Rly., 91, 95

- Martin v. Nutkin**, 370
 — *v. Porter*, 112
 — *v. Price*, 32, 582
 — *v. Roe*, 54
 — *v. Spicer*, 396
 — *v. Wright*, 810
Martindale, Re, 547
Martyr v. Lawrence, 114, 116
Marzials v. Gibbons, 285
Mason v. Hill, 179, 181, 185
 — *v. Mason*, 62
 — *v. Stokes Bay Pier and Rly.*, 94
Massam v. Thorley's Cattle Food Co., 333, 335, 425
Massey v. Goyder, 177
Master v. Hansard, 407, 409
Mathieson v. Garrod, 286
Matthews v. Great Northern Rly., 484
Matthewson v. Stockdale, 279, 296
Matthie v. Edwards, 462
Matts v. Hawkins, 177
Maudsley, Sons and Field, Re, 526
Maunsell v. Hort, 50, 51
 — *v. Midland Great Western Rly. of Ireland*, 133, 394, 480, 485, 490
Mawman v. Tegg, 275, 277, 279—282, 296
Maxim Nordenfelt v. Nordenfelt, 376, 380
Maxwell v. Hogg, 287, 339, 340, 344
 — *v. Somerton*, 294
May v. O'Neill, 381
Mayall v. Higby, 392, 428, 429
Mayer v. Spence, 252, 267, 564
Mayfair Property Co. v. Johnston, 121
Mayhew v. Maxwell, 801
Maynard v. Gibson, 43
Maynard's Settled Estates, Re, 45
Maythorne v. Palmer, 360, 361, 363
Mears v. Callender, 52
Melachrino v. Melachrino, 335
Mellor v. Thompson, 420, 426
Melville v. Mirror of Life Co., 313
Menier v. Hooper's Telegraph Co., 493, 494, 497
Menzies v. Lord Breadalbane, 198
Mercer v. Irving, 387, 388
 — *v. Woodgate*, 280
Merchant Banking Co. v. Merchants Joint Stock Bank, 498
Merchants' Trading Co. v. Banner, 398
Merryweather v. Moore, 426
Messageries Impériales v. Baines, 401, 405
Metropolitan Bank v. Pooley, 518
 — *Board of Works v. London and North Western Rly.*, 188
Metropolitan District Asylum v. Hill, 129, 157
 — *Electric Supply Co. v. Ginder*, 366, 394, 401, 403, 404
 — *Music Hall Co. v. Lake*, 601
 — *Rly. v. Cotton*, 171
 — *Rly. v. Wodehouse*, 92
Meux v. Bell, 467
 — *v. Cobley*, 38, 49, 51, 371
 — *v. Jacobs*, 54
Mexborough (Lord) v. Bower, 416
Mexican Co. v. Maldonado, 558
Micklethwaite v. Newlay Bridge Co., 179, 231
 — *v. Micklethwaite*, 66, 69, 70
Middleton v. Browne, 382, 385
 — *v. Magnay*, 467
Midland Rly. v. Ambergate, &c., Rly., 107
 — *v. Checkley*, 45, 174
 — *v. Great Western Rly.*, 106, 490
 — *v. Gribble*, 152, 224
 — *v. Haunchwood, &c., Co.*, 45, 171
 — *v. London and North Western Rly.*, 365, 490
 — *v. Miles*, 174
 — *v. Robinson*, 171, 174
Mighell v. Johore, 538
Miles v. Thomas, 448
 — *v. Tobin*, 17
Millar v. Taylor, 288, 302, 428, 480, 481
Millett v. Davey, 59
Millican v. Sullivan, 360, 399, 500
Milligan v. Mitchell, 459
Millington v. Fox, 29, 30, 350, 354
Mills v. Buenos Ayres Co., 474, 479, 537
Milltown (Earl of) v. Stewart, 561
Miner v. Gilmour, 182
Mineral Water, &c., Protection Society v. Booth, 380, 383
Mitchell v. Cantrill, 151
 — *v. Darley Main Colliery Co.*, 581
 — *v. Henry*, 21, 22, 320, 328—330
 — *v. Reynolds*, 376
 — *Re*, 331
Moet v. Couston, 29, 30, 352, 354
 — *v. Pickering*, 342, 354, 355
Moffatt v. Gill, 282, 298
Mogul Steam Ship Co. v. Macgregor, 7
Mollett v. Enequist, 559
Mollineux v. Powell, 55

- Monson v. Tussaud, 6, 486
 Montefiore v. Browne, 457
 Montgomery v. Thompson, 330
 Monti v. Barnes, 53
 Moody v. Hebbard, 567
 — v. Struggles, 548
 Moor v. Anglo-Italian Bank, 525, 528
 Moore, *Re*, 445
 — v. Bennett, 80
 — v. Clark, 309
 — v. Hall, 143
 — v. Rawson, 152, 224
 — v. Webb, 187, 188
 Morant v. Chamberlin, 230
 Mordue v. Dean of Durham, 46
 Moreland v. Richardson, 65, 84, 114
 Morgan v. Great Eastern Rly., 30
 — v. M'Adam, 844
 Morison v. Moat, 420, 425, 451
 Morocco Bound Syndicate v. Harris, 324
 Morrell v. Pearson, 27, 590
 Morris v. Ashbee, 278, 281, 290, 296, 297
 — v. Colman, 371, 448
 — v. Edgington, 222, 223
 — v. Grant, 88
 — v. Kelly, 276
 — v. Morris, 76, 77
 — v. Tottenham, &c., Rly., 104, 105
 — v. Wright, 282, 297
 Mortimer v. Wilson, 601
 Moseley v. Chadwick, 239
 — v. Victoria Rubber Co., 253
 — v. Walker, 238
 Moser v. Sewell, 263
 Moses v. Taylor, 378, 374
 Moss v. Bradburn, 577
 Mostyn v. Atherton, 182, 184, 185
 — v. Lancaster, 163
 Motley v. Downman, 20
 Mott v. Shoolbred, 121, 225, 226, 235
 Mouffet v. Cole, 384
 Mounsey v. Lord Lonsdale, 574
 Mouson v. Boehm, 331, 341
 Moxham v. Grant, 483
 Mozley v. Alston, 479, 491
 Muller v. Trafford, 367, 369
 Mullinger v. Midland Rly., 475, 476
 Mullins v. Howell, 593
 Mumford v. Gething, 377
 — v. Oxford, &c., Rly., 369
 Mundy v. Duke of Rutland, 168
 Munns v. Isle of Wight Rly. 108
 Munro v. Wivenhoe, &c., Rly., 21, 359, 561, 562, 565
 Munster v. Cammell Co., 477, 497
 Munt v. Shrewsbury and Chester Rly., 485
 Muntz v. Foster, 257
 — v. Grenfell, 265
 Murgatroyd v. Robinson, 187
 Murray v. Benbow, 431
 — v. Bogue, 297
 — v. Epsom L. B., 234
 — v. Maxwell, 286
 Musgrave v. Horner, 400
 Musselwhite v. Spicer, 377, 382
 Mutter v. Eastern, &c., Rly., 478, 479
 Myers v. Catterson, 146
 Myers' Patent, *Re*, 550
 Myers v. Sarl, 433

 NADIN, *Ex parte*, 91
 Nash v. Earl of Derby, 42
 National Co. v. Gibbs, 248
 National Manure Co. v. Donald, 469
 National, &c., Plate Glass Assurance Co. v. Prudential Assurance Co., 25, 32, 33
 National Opalite Syn. v. Ceralite Syn., 273
 National Starch Co. v. Munn's Co., 347, 348
 National Telephone Co. v. Baker, 129, 197
 Native Guano Co. v. Sewage Manure Co., 336
 Neale v. Cripps, 82
 Neath Canal Co. v. Ynisardwed, &c., Colliery Co., 115, 210
 Neaverson v. Peterborough Rural Council, 229
 Needham v. Johnson, 261
 Neilson v. Thompson, 16, 266
 Nelson v. Salisbury, &c., Rly., 87
 — v. Worssam, 595
 Nerot v. Burnand, 534
 Newall v. Elliott, 255
 Newby v. Harrison, 569, 592
 Newcastle (Duke) v. Worksop, 238
 Newcomen v. Coulson, 214, 215
 New Gold Coast Co., *Re*, 439, 547, 601
 Newhaven Local Board v. Newhaven School Board, 111
 Newling v. Dobell, 378, 382
 Newman, *Re*, 387, 388
 — v. Pinto, 344, 347
 — v. Ring, 597
 — v. Newman & Co., *Re*, 483
 Newmarch v. Brandling, 393, 415
 New Moss Colliery v. Manchester, &c., Rly. Co., 170
 New Prance and Garrard's Trustee v. Hunting, 458
 New River Co. v. Johnson, 194
 Newson v. Pender, 21, 28, 145, 153, 570

- Newton, *Re*, 544, 560
 — *v. Cowie*, 809, 810
 — *v. Cubitt*, 286, 287
 — *v. Metropolitan Rly.*, 95
 — *v. Newton*, 584, 587, 541
 — *v. Nock*, 895, 415
 New Travellers' Chambers *v. Cheese*, 544
 Nichol *v. Stockdale*, 275
 Nicholas *v. Chamberlain*, 200
 Nichols *v. Marsland*, 197
 Nicholls *v. Nicholls*, 212
 — *v. Stretton*, 877, 881, 885
 Nicholson *v. Knapp*, 418, 515
 — *v. Rose*, 866
 Nicoll *v. Beaumont*, 284
 — *v. Beere*, 882
 — *v. Fenning*, 878, 407, 410
 Nicols *v. Pitman*, 484
 Niemann *v. Harris*, 561
 Niger Merchants' Co. *v. Capper*, 544
 Noakes *v. Rice*, 468
 Nobel's Explosives Co. *v. Jones*, 249, 256, 258, 842
 Norbury (Lord) *v. Kitchen*, 182
 Nordenfelt *v. Gardner*, 80, 280
 Norfolk (Duke of) *v. Tennant*, 138
 Norman *v. Johnson*, 445
 — *v. Mitchell*, 469, 477
 Normanville *v. Stanning*, 564, 586
 Norris *v. Chambres*, 9
 — *v. Ormond*, 541
 North *v. Great Northern Rly.*, 584
 Northam *v. Hurley*, 199
 Northam Bridge and Road Co. *v. London and South Western Rly.*, 18, 28
 North and South Shields Ferry Co. *v. Barker*, 285
 North British Rly. *v. Todd*, 101, 102
 North British Rubber Co. *v. Gormully*, 247, 266
 — *v. Macintosh*, 259
 North Eastern Rly. *v. Crossland*, 167, 571
 North London Rly. *v. Great Northern Rly.*, 4, 7, 538
 — *v. Vestry of St. Mary*, 228
 North Shore Rly. *v. Pion*, 179
 Northumberland (Duke) *v. Bowman*, 19, 868
 Northumberland Avenue Hotel Co., *Re*, 491
 Norton *v. Cooper*, 59
 — *v. Dashwood*, 54
 — *v. London and North Western Rly.*, 129
 Norton *v. Nicholls*, 20
 Norwich (Mayor of) *v. Norfolk Rly.*, 865
 Nottage *v. Jackson*, 286, 812
 Nottingham Patent Brick Co. *v. Butler*, 862, 406, 408—411
 Novello *v. Sudlow*, 282, 800, 804
 Nuneaton Local Board *v. General Sewage Co.*, 397
 Nunn *v. D'Albuquerque*, 29, 272, 278
 Nutt *v. Easton*, 464
 Nuttall *v. Bracewell*, 180, 182, 191
 OAKLEY *v. Dalton*, 841
 O'Brien *v. O'Brien*, 71
 O'Callaghan *v. Barnard*, 588
 Ogden *v. Fossick*, 356
 Ogston *v. Aberdeen Tramways Co.*, 245
 Oldaker *v. Hunt*, 201
 Oldfield *v. Cobbett*, 589
 Oliver *v. Lowther*, 541
 Ollendorf *v. Black*, 13, 284
 Olliver *v. Olliver*, 481, 482
 Onley *v. Gardiner*, 149, 150
 Onslow *v. —*, 50, 395
 Oriental Inland Steam Co., *Re*, 528
 — Steamship Co. *v. Tyler*, 864, 866
 Original Hartlepool Collieries, *Re*, 519
 — *Gibb*, 209, 225
 Ormerod *v. Todmorden, &c.*, Mill Co., 15, 180, 577
 Orr *v. Diaper*, 844
 — *v. Glasgow, &c.*, Rly., 498
 Orr Ewing *v. Colquhoun*, 179, 180, 181, 288
 — *v. Johnston*, 342
 — *v. Registrar of Trade Marks*, 829, 881, 882
 Osborne *v. Morgan*, 540
 — *v. Wise*, 220, 221
 Osmond *v. Hirst*, 260
 Otto *v. Steele*, 278
 Outram *v. Maude*, 218
 Overton *v. Burn*, 551
 Owen *v. Davis*, 183
 Oxford and Cambridge Universities *v. Gill*, 841
 — *Richardson*, 246, 275
 Oxley *v. Holden*, 258
 Pacific Steam Navigation Co. *v. Gibbs*, 569
 Packington's Case, 71
 Page *v. Townsend*, 810

- Page *v.* Wisden, 286
 Paine *v.* Chisholm, 355
 — *v.* Edwards, 463
 Palin *v.* Gathercole, 483, 564
 Palmer *v.* Hendrie, 462
 — *v.* London and South Western
 Rly., 472
 — *v.* Mallett, 878, 881, 451
 Palmer's Trade Mark, *Re*, 831, 836,
 837
 Pardoe *v.* Pardoe, 58
 Paredes *v.* Lizardi, 585
 Paris Chocolate Co. *v.* Crystal Palace
 Co., 359, 400
 Parker *v.* Calcraft, 466
 — *v.* First Avenue Hotel Co.,
 144, 571
 — *v.* River Dun Navigation Co.,
 894
 — *v.* Whyte, 858, 872, 411
 Parkes *v.* Stevens, 260
 Parnell *v.* Parnell, 525
 Parr *v.* Attorney-General, 506, 508
 Perrott *v.* Palmer, 28, 37, 47, 59, 75,
 76, 188
 Parry and Hopkins, *Re*, 52
 Partridge *v.* Scott, 164
 Patching *v.* Dubbins, 362, 374
 Patent File Co., *Re*, 506
 Patman *v.* Harland, 411
 Pattison *v.* Gilford, 13, 858, 895
 Payler *v.* Homersham, 864
 Paynter *v.* Carew, 463
 Peacock *v.* Peacock, 448
 Pearce *v.* Crutchfield, 541
 — *v.* Wycombe Rly., 108, 472, 572,
 576
 Pearson *v.* Spencer, 212, 218, 222, 228
 Pease *v.* Coates, 378
 Pechel *v.* Fowler, 456
 Peck and London School Board, 211,
 212, 218, 228
 Peek *v.* Matthews, 361
 Pell *v.* Northampton, Banbury, &c.,
 Rly., 108
 Pendarves *v.* Munro, 153
 Pender *v.* Lushington, 494, 496
 Penn *v.* Bibby, 24
 Pennell *v.* Deffell, 529
 — *v.* Roy, 6, 519, 525—528
 Pennington *v.* Brinsop Hall Coal Co.,
 185, 201, 202
 Penrhyn (Mayor) *v.* Best, 238
 Pentland *v.* Somerville, 58, 71
 Pentney *v.* Lynn Paving Commis-
 sioners, 120
 Penton *v.* Robart, 52
 Percival *v.* Phipps, 483
 Percy and Kelly Mining Co., *Re*, 563
 Perkins *v.* Slater, 154
 Perks *v.* Wycombe Rly., 87
 Perrott *v.* Perrott, 89, 55
 Perry *v.* Eames, 149, 151
 — *v.* Shipway, 458
 — *v.* Truefitt, 344, 347
 — *v.* Weller, 555
 Perth General Station Committee *v.*
 Ross, 109
 Peru Republic *v.* Peruvian Guano Co.,
 518
 Peruvian Guano Co. *v.* Bockwoldt, 522
 Pescod *v.* Pescod, 539
 Petar *v.* Laily, 578
 Peter *v.* Daniel, 187, 205
 — *v.* Kendal, 286
 Petley *v.* Eastern Counties Rly., 61, 556
 Peto *v.* Brighton, Uckfield, and Tun-
 bridge Wells Rly., 360, 398, 402
 Petty *v.* Daniel, 596
 — *v.* Taylor, 814
 Pheysey *v.* Vicary, 211, 212, 222, 223
 Phillips *v.* Bury, 518
 — *v.* Great Western Rly., 416
 — *v.* Homfray, 76, 77, 112, 118
 — *v.* Low, 146, 212
 — *v.* Prentice, 560
 — *v.* Smith, 89, 40, 61
 — *v.* Thomas, 14, 86, 84, 126
 — *v.* Treeby, 114, 398, 415
 — *Charity, Re*, 460
 Phipps *v.* Jackson, 856, 895, 400
 Phoenix Life Ass. Co., *Re*, 470
 Phosphate of Lime Co. *v.* Green, 481
 Pickering *v.* Bishop of Ely, 860, 899
 — *v.* Cape Town Rly., 589
 — *v.* Stephenson, 483
 Pickford *v.* Grand Junction Rly., 472
 Pidding *v.* How, 844
 Pidgley *v.* Rawling, 40
 Pierce *v.* Franks, 30, 354
 Piers *v.* Piers, 68
 Piggott *v.* Stratton, 865, 896, 413
 Pigot *v.* Bullock, 78
 Pike, *Re*, 530
 — *v.* Cave, 568
 — *v.* Nicholas, 296, 297, 326, 327
 Pilkington *v.* Scott, 385
 Pinchin *v.* London and Blackwall Rly.,
 14, 85, 93, 97, 100
 Pinnington *v.* Galland, 221
 Pinto *v.* Badman, 382
 Pitts *v.* George, 325
 Plake *v.* Hall, 121
 Plant *v.* James, 211
 — *v.* Stott, 115, 197
 Plating Co. *v.* Farquharson, 272, 600,
 601
 Platt *v.* Button, 289
 Playfair *v.* Birmingham, Bristol, &c.,
 Rly., 492

- Plimpton *v.* Malcolmson, 261, 264
 — *v.* Spiller, 21, 266, 548
 Plumbly *v.* Perryman, 487
 Plymouth (Countess of) *v.* Archer, 78
 Pneumatic Tyre Co. *v.* Chisholm, 251
 — *v.* Goodman, 249
 — *v.* Marwood, 268
 — *v.* Warrilow, 266
 Polden *v.* Bastard, 212
 Pole *v.* Joel, 562
 Polini *v.* Gray, 25, 581
 Pollard, *Re*, 576
 — *v.* Clayton, 861
 — *v.* Gare, 147
 — *v.* Photographic Co., 318, 420, 426, 428, 429, 482
 Pollock *v.* Lester, 121, 156
 — *v.* Stables, 866
 Pomfret *v.* Ricroft, 146, 221
 Ponsardin *v.* Peto, 851
 Poole *v.* Huskisson, 228, 229, 280
 Pooley *v.* Budd, 585
 Pope *v.* Curl, 291, 480, 482
 — *v.* Whalley, 240
 Popplewell *v.* Hodgkinson, 164
 Portarlington (Earl of) *v.* Soulby, 521
 Portland (Duke of) *v.* Hill, 47
 Potts *v.* Levy, 14, 20, 125, 145
 — *v.* Potts, 564
 — *v.* Smith, 144
 Poulet *v.* Chatto, 487
 Poulton, *Re*, 287
 Pountney *v.* Clayton, 174
 Powell *v.* Aiken, 28, 77, 118, 115, 197, 416
 — *v.* Cleaver, 542
 — *v.* Cockerell, 576
 — *v.* Head, 307
 — *v.* Williams, 578
 — *v.* Wright, 588
 — Duffryn Steam Coal Co. *v.* Taff Vale Rly., 107
 Powers *v.* Bathurst, 280
 Powley *v.* Walker, 49
 Powys *v.* Blaggrave, 52
 Pratt *v.* Brett, 50, 895
 — *v.* Inman, 600
 — *v.* Walker, 557, 567, 576
 Preston (Corporation of) *v.* Fullwood Local Board, 288
 — *v.* Luck, 2, 418
 Price *v.* Bala, &c., Rly., 417
 — *v.* Green, 877, 882, 885, 889
 — *v.* Hutchison, 600
 Price's Patent Candle Co., *v.* Bauwen's Candle Co., 28
 Prince *v.* Lewis, 289
 Proctor *v.* Bayley, 269, 270, 272
 — *v.* Benniss, 16, 17, 27, 249, 255, 260, 261, 269, 278
 — *v.* Hodgson, 222
 — *v.* Sargent, 882
 — *v.* Smiles, 422
 Prosser *v.* Bank of England, 529
 Protheroe *v.* Tottenham, &c., Rly., 91, 104
 Proud *v.* Bates, 46, 167, 214, 217
 Prynne, *Re*, 567
 Pryor *v.* Petre, 179, 281
 Prytherch, *Re*, 466
 Pudsey Gas Co. *v.* Corporation of Bradford, 120, 471, 478
 Pugh *v.* Arton, 58
 — *v.* Golden Valley Rly., 105
 — *v.* Vaughan, 55
 Pulbrook *v.* Richmond Mining Co., 477, 478, 480, 497
 Pulling *v.* London, Chatham, and Dover Rly., 96
 Pulteney *v.* Shelton, 50, 895
 Purcell *v.* Nash, 46
 Pycroft *v.* Pycroft, 564

 QUARRIE *v.* Colston, 8
 Quartz Hill Mining Co. *v.* Beall, 6, 486, 487, 488, 560
 Queen *v.* Cambrian Rly., 287
 — *v.* D'Eyncourt, 500
 Queensberry (Duke of) *v.* Shebbeare, 480, 481
 Queen's College *v.* Hallett, 49
 Queensland Mercantile Agency Co., *Re*, 524
 Quick, *Ex parte*, 97
 Quincey, *Ex parte*, 53
 Quinn *v.* Leathem, 242, 248, 244

 RADCLIFFE *v.* Duke of Portland, 141
 Raleigh *v.* Goschen, 85
 Ralph, *Re*, 886, 341
 Rameshur, &c., Singh *v.* Koonig, 191
 Ramsden *v.* Dyson, 16, 17
 — *v.* Manchester, &c., Rly., 94
 Randall *v.* Commercial Rly., 556
 Rangeley *v.* Midland Rly., 104, 281
 Ranger *v.* Great Western Rly., 886, 887
 Ranken *v.* East and West India Docks Co., 99
 Rankin *v.* Huskisson, 867, 871, 415
 Rantzen *v.* Rothschild, 599
 Raphael *v.* Thames Valley Rly., 184, 414
 Rashleigh *v.* South Eastern Rly., 865
 Ratcliffe *v.* Evans, 489
 — *v.* Winch, 518
 Rawlings *v.* Lambert, 568
 Rawstron *v.* Taylor, 191, 198, 199

- Rayne *v.* Benedict, 586
 Read *v.* Andrew, 268
 — *v.* Blunt, 445
 — *v.* Bowers, 449
 — *v.* Stonemasons' Soc., 248
 Reade *v.* Bentley, 289
 — *v.* Conquest, 281, 299, 300, 306, 429
 — *v.* Lacy, 295, 305—307
 Reddaway *v.* Banham, 355
 Redhead *v.* Welton, 519
 Reeve *v.* Gibson, 327
 Reeves *v.* Cattell, 373
 Reg. *v.* Aire and Calder Navigation Co., 173
 — *v.* Betts, 207
 — *v.* Birmingham and Oxford Junction Rly., 100
 — *v.* Bradford Navigation Co., 129
 — *v.* Chester (Dean), 515
 — *v.* Chorley, 228
 — *v.* Darlington Board of Health, 182, 187, 200
 — *v.* Darlington School, 460
 — *v.* Dover, 5
 — *v.* East and West India Docks and Rly., 128
 — *v.* Eastmark, 229
 — *v.* Great Northern Rly., 99
 — *v.* Gynghall, 548
 — *v.* Halifax C. C., 11
 — *v.* Hungerford Market, 92
 — *v.* Lister, 162
 — *v.* London and South Western Rly., 98, 97
 — *v.* Longton Gas Co., 162, 283
 — *v.* Mayor, &c., of Exeter, 509
 — *v.* Mayor, &c., of Tamworth, 509
 — *v.* Metropolitan Board of Works, 194
 — *v.* Payne, 601
 — *v.* Petrie, 229
 — *v.* Poulter, 91
 — *v.* Rochester (Dean and Chapter of), 515
 — *v.* Train, 238
 — *v.* Upper Boddington, 422
 — *v.* Woods and Forests (Commissioners of), 92
 Reichardt *v.* Sapte, 306
 Reichel *v.* Magrath, 518
 Reinhardt *v.* Mentasti, 156, 159
 Remfry *v.* Natal, 199
 Remington *v.* Scoles, 518
 Renals *v.* Cowlshaw, 408—410
 Renard *v.* Levinstein, 248, 253, 267
 Rendall *v.* Crystal Palace Co., 507
 Rendell *v.* Blair, 461, 515
 — *v.* Grundy, 597
 Rennie *v.* Young, 17
 Rex *v.* Catherine Hall, 518
 — *v.* Clement, 546
 — *v.* Dolby, 511
 — *v.* Leeds and Selby Rly., 173
 — *v.* Mashiter, 364
 — *v.* Oxfordshire (Inhabitants of), 194
 — *v.* Pagham (Commissioners of Sewers for), 208
 — *v.* St. Dunstan's, 58
 — *v.* South Holland Drainage, 98
 — *v.* Starkey, 238
 — *v.* Trafford, 198
 — *v.* Ward, 206
 Reynell *v.* Sprye, 551, 590
 Reynolds *v.* Bridge, 387, 388
 — *v.* Clarke, 117
 — *v.* Presteign D. C., 284
 Rice's Case, 57
 Richards *v.* Butcher, 342
 — *v.* Cullerne, 11
 — *v.* Noble, 59
 — *v.* Platel, 467
 — *v.* Revitt, 362, 405, 418
 — *v.* Richards, 91
 — *v.* Rose, 148, 176
 — *v.* Swansea Improvement, &c., Co., 98
 Richardson *v.* Gilbert, 302
 — *v.* Hastings, 446
 — *v.* Methley School Board, 5
 Richmond Waterworks Co. *v.* North London Rly., 98
 — *v.* Vestry of Richmond, 488, 491
 Ridgway *v.* Roberts, 534
 Rigall *v.* Foster, 459
 Rigby *v.* Bennett, 167
 — *v.* Connol, 504
 — *v.* Great Western Rly., 21, 22, 356—358, 364, 365
 Ripon (Earl of) *v.* Hobart, 13, 20, 125, 187, 196
 River Dun Navigation Co. *v.* North Midland Rly., 86
 Rivett *v.* Grimshaw, 818
 Rivière's Trade Mark, *Re*, 382
 Rivington *v.* Garden, 31
 Robb *v.* Green, 420, 426
 Robbins *v.* Jones, 231
 Roberts *v.* Bozon, 534
 — *v.* Carr, 229
 — *v.* Eberhardt, 453
 — *v.* Gwyrfaï District Council, 110, 136, 184, 201
 — *v.* Richards, 183, 191, 200
 — *v.* Roberts, 57, 540
 — *v.* Rose, 205
 Robertson *v.* Hartopp, 48

- Robinson v. Byron (Lord), 114, 198
 — v. Finlay, 841
 — v. Grave, 148
 — v. Heuer, 376
 — v. Pickering, 587, 540
 Robinson's Executors, *Ex parte*, 445
 Robson v. Dodds, 479
 — v. Whittingham, 141
 Rochdale Canal Co. v. King, 16, 17,
 19, 25, 27, 192, 201
 — — v. Radcliffe, 192,
 469
 Rock v. Lazarus, 810
 Roderick v. Aston Local Board, 144
 Rodgers v. Nowill, 888
 — v. Rodgers, 854
 Rogers v. Dock Co. of Hull, 91
 — v. Drury, 878
 — v. Hosegood, 867, 872, 412
 — v. Maddocks, 385
 — v. Price, 395
 Rogers' Trade Mark, 387
 Rolfe v. Peterson, 890
 — v. Rolfe, 382
 Rollason, *Re*, 317
 Rolleston v. New, 395
 Rolls v. Miller, 874
 — v. School Board for London, 88,
 90
 Rolt v. Somerville, 67
 Rooke v. Dawson, 461, 515
 Roper v. Williams, 361
 Rose v. Groves, 225
 — v. Loftus, 80, 353
 Ross v. Adcock, 64
 — v. Buxton, 584, 586
 — v. Fedden, 198
 — v. Sherer, 529, 580
 Roswell's Case, 35
 Rothes (Countess of) v. Kirkcaldy
 Waterworks Co., 197
 Rothwell v. King, 264
 Rousillon v. Rousillon, 8, 376, 380,
 381
 Routh v. Webster, 454
 Routledge v. Low, 283, 284
 Rowbotham v. Wilson, 163, 168
 Rowe v. Wood, 59
 Rowland v. Mitchell, 19, 348
 Rowlatt v. Cattell, 556
 Roworth v. Wilkes, 294, 309
 Royal Baking Powder Co. v. Wright,
 489
 Royal Mail Steam Packet Co. v.
 George, 189
 Ruabon Brick, &c., Co. v. G. W. Rly.,
 174
 Rugby Charity v. Merryweather, 229,
 280
 Rumbold v. Forteach, 575
 Rundell v. Murray, 17, 254, 278, 289,
 291
 Rundle v. Hearle, 209, 230, 231
 Russell v. Baber, 374
 — v. East Anglian Rly., 598, 598
 — v. Jackson, 420—422
 — v. Russell, 447
 — v. Smith, 804, 805, 807
 — v. Wakefield Waterworks Co.,
 495
 — v. Watts, 16, 80, 146, 148,
 149, 221
 Rust v. Victoria Graving Dock Co.,
 199
 Ruston v. Tobin, 578
 Ryan v. Mutual Tontine, &c., Ass.,
 15, 107, 859, 860, 898
 Rylands v. Fletcher, 197

 SACCHARIN Corp. v. Anglo-Continental,
 &c., 257
 — — v. Chemicals Co.,
 258, 267, 358
 — — v. Quincey, 252,
 270
 — — v. Reitmayer, 258
 Sadd v. Maldon, Braintree, &c., Rly.,
 103
 Sadler v. Great Western Rly., 128
 Sainsbury v. Jones, 359
 Sainter v. Ferguson, 857, 877, 881,
 886, 887, 889, 891
 Salisbury v. Metropolitan Rly., 488
 — (Marquis of) v. Gladstone, 47
 — — v. Great Northern
 Rly., 92, 100, 101
 Salmon v. Randall, 88
 Salomon v. Stalman, 567
 Salomons v. Knight, 486
 — v. Laing, 479, 482
 Salop (Town of) v. Att.-Gen., 460
 Salter v. Metropolitan Rly., 98
 — v. Salter, 445
 Salvin v. North Brancepeth Coal Co.,
 140, 155, 245
 Sampson v. Hoddinott, 181, 182, 186,
 187
 — v. Smith, 156
 Sanders v. Rodway, 374
 Sanders-Clark v. Grosvenor Mansions
 Co., 123, 156
 Sanderson v. Cockermouth and Work-
 ington Rly., 90
 Sandwich (Lord) v. Great Northern
 Rly., 181
 Sandys v. Murray, 84
 Sanxter v. Foster, 21, 564
 Sarazin v. Hamel, 250, 319

- Sargent *v.* Read, 553
 Saul *v.* Browne, 7
 Saunders *v.* Newman, 181, 189
 — *v.* Smith, 12, 17, 254, 275,
 278—280, 291, 308
 — *v.* Wiel, 277, 318
 Saunders' Case, 44, 46
 Savage *v.* Brindle, 249
 Saville *v.* Kilner, 156
 Saville's Case, 56
 Savory *v.* Dyer, 550
 Saxby *v.* Easterbrook, 440
 Saxlehner *v.* Apollinaris Co., 352
 Sayers *v.* Collyer, 19, 361, 362, 582
 Scanlan, *Re*, 548
 Scarisbrick *v.* Tunbridge, 362
 Scheile *v.* Brakell, 545
 Schlesinger *v.* Bedford, 306, 592
 — *v.* Turner, 306
 Schmidt's Trade Mark, *Re*, 331
 Schmitt *v.* Faulkes, 558, 586
 Schofield *v.* Reilly, 162
 Schoole *v.* Sall, 462
 Schove *v.* Schminke, 285, 291, 336, 340
 Schreiber *v.* Creed, 374
 Schwinge *v.* London and Blackwall
 Rly., 91
 Scotson *v.* Gaury, 559
 Scott *v.* Becher, 457
 — *v.* Moxon, 593
 — *v.* Pape, 143, 149, 152, 153
 — *v.* Rowland, 452
 — *v.* Stanford, 281, 290, 293, 295
 Scottish North Eastern Rly. *v.*
 Stewart, 400, 433
 Seagram *v.* Knight, 78
 Sealey *v.* Gaston, 540
 Sear *v.* House Property, &c., Society,
 375
 Searle *v.* Choate, 549
 Seaward *v.* Paterson, 553, 595, 596, 599
 Secretary of State for War *v.* Chubb,
 568
 Seddon *v.* Bank of Bolton, 150
 Seear *v.* Webb, 561
 Seixo *v.* Provezende, 329
 Selby *v.* Colne Valley and Halstead
 Rly., 89, 103
 — *v.* Nettlefold, 217
 Sellors *v.* Matlock Board of Health,
 80, 131, 136, 162, 226
 Selous *v.* Croydon Board of Health, 599
 Semple *v.* London and Birmingham
 Rly., 122, 587
 Senhouse *v.* Christian, 213, 215
 Senior *v.* Pawson, 32, 33
 Septimus Parsonage & Co., *Re*, 547
 Serf *v.* Acton Local Board, 221
 Service *v.* Castaneda, 554, 585
 Seton *v.* Slade, 387
 Sevenoaks and Tunbridge Rly. *v.* Lon-
 don, Chatham and Dover Rly., 488
 Sevin *v.* Deslandes, 401
 Seymour *v.* London and South Wes-
 tern Rly., 99
 Shafto *v.* Bolckow, 552
 Sharp *v.* Brauer, 442
 — *v.* Waterhouse, 199
 Sharpe, *Re*, 481
 Shaw *v.* Lord Jersey, 28, 88, 570
 Sheard *v.* Webb, 362
 Shears *v.* Wood, 182
 Shelfer *v.* City of London, &c., Co.,
 15, 25, 26, 121, 134, 269, 270, 570,
 582, 583
 Shelley *v.* Westbrook, 542
 Shepherd *v.* Conquest, 304, 305
 Sheppard *v.* Gilmore, 407, 577
 — *v.* Hong Kong, &c., Banking
 Co., 375
 Sheriff *v.* Coates, 275, 321
 Shiel *v.* Godfrey, 33, 34
 Shillito *v.* Larnuth, 264
 Shipwright *v.* Clements, 337, 338
 Shore *v.* Att.-Gen., 458
 — *v.* Wilson, 364
 Shotts Iron Co. *v.* Inglis, 160, 245
 Shrewsbury and Birmingham Rly. *v.*
 London and North
 Western Rly., 360, 436
 — *v.* Stour Valley Rly., 361
 — and Chester Rly. *v.* Shrews-
 bury and Birmingham Rly., 13, 396,
 447
 Sicklemore *v.* Thissleton, 364
 Sidney *v.* Sidney, 537, 541
 Siegert *v.* Findlater, 342, 347, 424
 Sieveking *v.* Behrens, 518
 Siggers *v.* Evans, 458
 Simmons *v.* Norton, 42, 49
 Simper *v.* Foley, 121, 151
 Simpson *v.* Dendy, 232
 — *v.* Denison, 106, 478, 485—487
 — *v.* Lancaster Rly., 92
 — *v.* Savage, 369
 — *v.* Simpson, 78
 — *v.* South Staffordshire Water-
 works Co., 86, 88
 — *v.* Westminster Palace Hotel
 Co., 478, 483, 487
 Sims *v.* Marryatt, 288
 Singer *v.* Audsley, 575
 — Manufacturing Co. *v.* Loog, 336,
 346
 — Sewing Machine Manufac-
 turing Co. *v.* Wilson, 338, 343, 351, 564
 Skinner & Co. *v.* Shew, 441, 442
 Skinners' Society *v.* Irish Society, 20
 Skip *v.* Harwood, 594
 Skull *v.* Glenister, 211, 216

- Slazenger v. Pigott, 354
 Slee v. Corporation of Bradford, 367, 397
 Sloan v. Holliday, 217
 Smallman v. Onions, 56
 Smith, *Re*, 567
 — v. Andrews, 207, 233
 — v. Baxter, 150—154, 591
 — v. Brown, 115
 — v. Carter, 50
 — v. Chatto, 281, 298, 294
 — v. Day, 23, 82, 584, 591, 592
 — v. Dixon, 568
 — v. Duke of Manchester, 488
 — v. Elger, 145
 — v. Fromont, 454
 — v. Great Western Rly., 172, 175
 — v. Hancock, 379
 — v. Harwich, 366
 — v. Howden, 231
 — v. Jeyes, 449, 458
 — v. Johnson, 301
 — v. Kenrick, 196
 — v. London and North Western Rly., 248
 — v. London and South Western Rly., 254
 — v. Midland Rly., 107, 156
 — v. Northleach D. C., 576
 — v. Owen, 145
 — v. Peters, 419
 — v. Smith, 18, 27, 31, 33, 84, 541, 582
 — v. Swansea Dock Co., 562
 — v. Weguelin, 7
 Smythe v. Smythe, 71
 Snow v. Whitehead, 197
 Snuggs v. Seyd, 30
 Société Anonyme, &c. v. Panhard-Levassor Co., 499
 Société, &c., de Glaces v. Tilghman, 437—440, 442
 Solicitor, *Re* A, 596
 Soltan v. De Held, 118, 119, 124, 140, 159, 551
 Somerville v. Schembri, 329
 Songhurst v. Dixey, 61
 Sonnenschein v. Barnard, 29, 30, 578
 Southall v. British Mutual, &c., Society, 488
 Southey v. Sherwood, 278, 292, 430, 431
 Southport Banking Co. v. Thompson, 53, 54
 South Metropolitan Cemetery Co. v. Eden, 216
 South Wales Rly. v. Redmond, 482, 487
 — v. Wythes, 356, 359
 Southwark, &c., Water Co. v. Wandsworth Board of Works, 126
 South Yorkshire Rly., &c. v. Great Northern Rly., 486
 Sowerby v. Fryer, 63, 64
 Spackman v. Evans, 480
 — v. Lattimore, 479, 485
 Spalding v. Keely, 559
 Spanish General Agency v. Spanish Corp., 558, 588
 Sparrow v. Oxford, Worcester, and Wolverhampton Rly., 13, 92, 99
 Spedding v. Fitzpatrick, 211
 Spencer v. London and Birmingham Rly., 23
 — v. Scurr, 45
 Spicer v. Martin, 403, 407, 409
 Spiers v. Brown, 232, 295
 Spokes v. Banbury Board of Health, 208, 593, 599
 — v. Grosvenor Hotel Co., 494
 Spottiswoode v. Clark, 279, 339
 — v. Stockdale, 457
 Spurrier v. La Cloche, 365
 Squier v. Mayer, 53
 Squire v. Campbell, 118, 124, 137, 226, 366
 St. Albans (Bishop of) v. Battersby, 373
 — (Duke of) v. Skipwith, 63
 St. George's Steam Packet Co., *Re*, 483
 St. Helen's Smelting Co. v. Tipping, 155, 245
 St. John's College v. Toddington, 513
 St. Mary, Newington (Vestry of) v. Jacobs, 227
 St. Thomas' Hospital v. Charing Cross Rly., 96, 97, 98
 St. Victor v. Devereux, 588
 Stadhard v. Lee, 365
 Stafford (Marquis of) v. Coyney, 228, 229
 Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co., 192
 Stagg v. Medway Navigation, 470
 Staigt v. Burn, 142, 153
 Stainton v. Carron Iron Co., 444, 522
 — v. Woolrych, 128, 134
 Stamps v. Birmingham and Stour Valley Rly., 91, 560
 Standard Bank, &c. v. Stokes, 177, 178
 Standish v. Mayor, &c., of Liverpool 86
 Stanford v. Hurlstone, 82
 Stanley v. Coulthurst, 74
 — (Lady) v. Lord Shrewsbury, 32, 584
 — of Alderley (Lord) v. Wild, 11
 Stannard v. Harrison, 309
 — v. Lee, 237, 309

- Stannard *v.* Vestry of St. Giles, 5, 187, 188
 Stansfield *v.* Habergham, 55, 58
 Staple *v.* Heydon, 212
 Staples *v.* Eastman Photo. Co., 484
 Stapleton *v.* Foreign Vineyard Association, 546
 Stead *v.* Clay, 529
 Stedman *v.* Smith, 177, 186
 ——— *v.* Webb, 467
 Steedman *v.* Poole, 585
 Steele *v.* Midland Rly., 98, 392
 ——— *v.* North Metropolitan Rly., 10
 Stephens, *Ex parte*, 381
 ——— *v.* Mysore Reefs Mining Co., 488
 ——— *v.* Workman, 601
 Sterry *v.* Clifton, 364
 Stevens, *Re*, 445
 ——— *v.* Benning, 289
 ——— *v.* Brett, 326
 ——— *v.* Chown, 8, 14, 205, 239, 508
 ——— *v.* Keating, 574
 ——— *v.* South Devon Rly., 484—486, 492
 ——— *v.* Theatres, Lim., 588
 ——— *v.* Wildy, 237, 291, 296
 Stevenson *v.* Moore, 47
 Stiff *v.* Cassell, 371
 Stirling *v.* Maitland, 366
 Stockdale *v.* Onwhyn, 292
 Stocker *v.* Brocklebank, 399
 ——— *v.* Planet Building Society, 64
 ——— *v.* Wedderburn, 473
 Stocking *v.* Llewellyn, 559
 Stockport Waterworks Co. *v.* Mayor, &c., of Manchester, 120, 470
 ——— *v.* Potter, 180, 186, 199
 Stockton and Darlington Rly. *v.* Brown, 88
 ——— and Hartlepool Rly. *v.* Leeds and Thirsk Rly., 9
 ——— Football Co. *v.* Gaston, 597
 Stoke Parish Council *v.* Price, 87, 508
 Stokes *v.* City Offices Co., 154
 Stone *v.* Commercial Rly., 91
 Storer *v.* Great Western Rly., 414, 416, 599
 Stourbridge Canal Co. *v.* Lord Dudley, 170, 174
 Strachey *v.* Francis, 68, 64
 Strahan *v.* Graham, 312
 Strathmore (Lady) *v.* Bowes, 71
 Street *v.* Union Bank of Spain, 545
 Strelly *v.* Pearson, 419, 581
 Stretton *v.* Great Western, &c., Rly., 87, 91, 101
 Stretton's Derby Brewery *v.* Derby Corp., 204
 Stribley *v.* Hawke, 1
 Stride *v.* Martin, 382
 Stroud *v.* Wandsworth Board of Works, 88, 90
 Strutt *v.* Bovingdon, 188
 Stuart *v.* Diplock, 373
 Stubbs *v.* Howard, 301
 Studdert *v.* Grosvenor, 488, 494
 Stupart *v.* Arrowsmith, 480
 Sturge *v.* Eastern Union Rly., 484
 Sturgeon *v.* Hooker, 586
 Sturges *v.* Bridgman, 160
 Sturz *v.* De la Rue, 252, 267
 Sudlow *v.* Dutch Rhenish Rly., 527
 Suffield *v.* Brown, 222
 Sugg *v.* Silber, 578
 Sunderland *v.* Newton, 397
 Sutcliffe *v.* Booth, 191
 Sutton *v.* Mumford, 556
 ——— *v.* Mayor, &c., of Norwich, 85
 ——— *v.* South Eastern Rly., 472
 Swaine *v.* Great Northern Rly., 128, 157
 Swale *v.* Swale, 461
 Swansborough *v.* Coventry, 146
 Sweet *v.* Benning, 291, 293, 295, 298, 300, 303
 ——— *v.* Cator, 23, 275, 289
 ——— *v.* Ely (Bishop), 516
 ——— *v.* Maugham, 276 — 278, 282, 291
 ——— *v.* Shaw, 279, 288, 293, 295, 298, 303
 Sweetman *v.* Metropolitan Rly., 99
 Swift *v.* Swift, 398
 Swinbourne *v.* Nelson, 253
 Swindon Waterworks Co. *v.* Wilts and Berks Canal Co., 181, 182, 183, 192, 200, 204, 474
 Swire, *Re*, 520
 Syers *v.* Metropolitan Board of Works, 91, 99
 Sykes *v.* Howarth, 249, 258
 Symonds *v.* Hallett, 540
 Synnot *v.* Simpson, 458
 TAFF Vale Rly. *v.* Amalgamated Soc. of Railway Servants, 244, 505
 Taite *v.* Gosling, 368
 Talbot *v.* Ford, 360
 ——— *v.* Scott, 81
 Tallis *v.* Tallis, 378, 380, 381, 383
 Tamworth (Lord) *v.* Lord Ferrers, 68, 71
 Tapling *v.* Jones, 149, 190
 Tatham *v.* Parker, 600
 Taunton *v.* Royal Insurance Co., 487
 Tawney *v.* Lynn and Ely Rly., 92
 Taws *v.* Knowles, 148, 222, 224

- Taylor, *Re*, 91
 — *v.* Clemson, 102
 — *v.* Davis, 416, 449
 — *v.* Hughes, 477
 — *v.* Mostyn, 112, 118, 872
 — *v.* Neville, 289, 807, 808
 — *v.* Pillow, 289
 — *v.* Roe, 597
 — *v.* St. Helen's (Corporation of), 194, 199, 363, 364
 Tebb *v.* Cave, 395
 Teebay *v.* Manchester, &c., Rly., 225
 Telegraph Despatch, &c., Co. *v.* Maclean, 360
 Telford *v.* Metropolitan Board of Works, 393, 397
 Temple Bar, The, 578, 579
 Temple Pier Co. *v.* Metropolitan Board of Works, 112
 Teuliere *v.* St. Mary Abbots Vestry, 110
 Thames Conservancy *v.* London Port, &c., 208
 Thicknesse *v.* Lancaster Canal Co., 98
 Thiedemann *v.* Goldsmidt, 586
 Thomas *v.* Birmingham Canal Co., 197
 — *v.* Hunt, 259
 — *v.* Oakley, 76
 — *v.* Owen, 212
 — *v.* Thomas, 161, 189
 — *v.* Turner, 285, 286, 313
 — *v.* Williams, 6, 585
 Thompson *v.* Falk, 421
 — *v.* Hudson, 389
 — *v.* Stanhope, 481—484
 — *v.* London County Council, 128
 — *v.* Moore, 270
 — *v.* University of London, 513, 514
 — *v.* Waterlow, 211
 Thomson, *Re*, 433
 — *v.* Hughes, 265
 Thorley's Food for Cattle Co. *v.* Mas-
 sam, 386, 439
 Thorne *v.* Taw Vale Rly. Dock Co., 87
 Thorneloe *v.* Hill, 354
 — *v.* Skoines, 550
 Thorncroft *v.* Crockett, 59
 Thorpe *v.* Brumfitt, 122, 123, 210, 211, 225
 Three Towns Banking Co. *v.* Maddever, 269, 348
 Thurso Gas Co., *Re*, 524
 Thynne *v.* Shove, 339
 Tickle *v.* Brown, 218
 Tiessen *v.* Henderson, 495
 Tilbury *v.* Silva, 179
 Tillett *v.* Nixen, 466
 Tink *v.* Rundle, 91
 Tinkler *v.* Wandsworth District Board, 509
 Tinsley *v.* Lacy, 293, 295, 298—300
 Tipping *v.* Clarke, 420, 421
 — *v.* Eckersley, 14, 62, 201, 202, 358, 395, 412, 418
 — *v.* St. Helen's Smelting Co., 26, 155, 156, 157, 160, 245
 Titchmarsh *v.* Royston Water Co., 220
 Tiverton and North Devon Rly. *v.* Loosemore, 92, 100, 101
 Todd *v.* Gee, 359
 Tompkinson *v.* South Eastern Rly., 483
 Tonge *v.* Ward, 851
 Tonnins *v.* Prout, 584
 Tonson *v.* Walker, 291
 Tooker *v.* Annesley, 78
 Toole *v.* Young, 306
 Tottenham District Council *v.* William-
 son, 87, 119, 508
 Townsend *v.* Haworth, 249, 258
 — *v.* Jarman, 388, 379, 451, 452
 Tracy *v.* Tracy, 55
 Trade Auxiliary *v.* Middlesboro', 301, 302
 — *v.* Vickers, 495
 Transatlantic Co. *v.* Pietroni, 525
 Travers *v.* Lord Stafford, 588
 Treacher *v.* Treacher, 374
 Treadwell *v.* London and South West-
 ern Rly., 97
 Trego *v.* Hunt, 388, 385, 450, 453
 Treloar *v.* Bigge, 375
 Trevor *v.* Whitworth, 483
 Trinidad Asphalt Co. *v.* Anbard, 163, 164
 Tritton *v.* Bankhart, 368
 Trollope *v.* London Building Federa-
 tion, 244
 Trotter *v.* Maclean, 112, 113
 Trower *v.* Chadwick, 176, 177
 Truman *v.* London, Brighton, &c.,
 Rly., 235
 — & Co. *v.* Redgrave, 465
 Truscott *v.* Merchant Taylors' Co., 149, 152
 Trusler *v.* Murray, 290
 Tuck *v.* Canton, 312, 314
 — *v.* Priestler, 313, 314, 420, 427, 428
 — *v.* Silver, 23
 Tucker *v.* Linger, 46, 49
 — *v.* New Brunswick Trading Co., 569
 — *v.* Vowles, 366
 Tulk *v.* Moxhay, 405, 406, 411
 Tullitt *v.* Tullitt, 57
 Tunbridge Wells (Mayor) *v.* Baird, 110, 231

- Turkington *v.* Kearnan, 61
 Turner *v.* Blamire, 86, 187
 — *v.* Crush, 225
 — *v.* Evans, 878, 882
 — *v.* London and South Western
 Rly., 416
 — *v.* Major, 449, 451
 — *v.* Mirfield, 120
 — *v.* Ringwood Highway Board,
 282
 — *v.* Robinson, 815, 429, 480
 — *v.* Spooner, 145
 — *v.* Turner, 567
 — *v.* Walsh, 228, 229
 — *v.* Wright, 57, 58, 66
 Turton *v.* Turton, 81
 Tussaud *v.* Tussaud, 884
 Tweedale *v.* Ashworth, 262
 Twort *v.* Twort, 56, 77
 Twycross *v.* Dreyfus, 7
 Tyndall *v.* Castle, 409
 Tynemouth Corp. *v.* Att.-Gen., 508
- UMFREVILLE *v.* Johnson, 156
 Underwood *v.* Barker, 876
 Union, Electrical, &c., Co. *v.* Electrical
 &c., Power Co., 448
 Union Lighterage Co. *v.* London
 Graving Dock Co., 165, 222
 United Land Co. *v.* Great Eastern
 Rly., 115, 216
 United Merthyr Collieries Co., *Re*,
 118
 United States *v.* Prioleau, 8
 United Telephone Co. *v.* Dale, 258, 271,
 594, 595
 — — *v.* Equitable Tele-
 phone Co., 266
 — — *v.* Nelson, 259
 — — *v.* Sharples, 256—
 258
 — — *v.* Tasker, 266
 — — *v.* Walker, 858
 Unwin *v.* Hanson, 232
 — *v.* Heath, 262
 Upmann *v.* Elkan, 272, 842, 850, 851,
 854
 — *v.* Forester, 28, 29, 278, 851,
 854, 578
- VALENTINE *v.* Valentine, 888
 Vance *v.* East Lancashire Rly., 485,
 486
 Vane *v.* Lord Barnard, 66, 67
 — *v.* Cockermouth and Darlington
 Rly., 88
 Van Gelder *v.* Sowerby, 248, 868
 Vansandau, *Ex parte*, 601
- Vansandau *v.* Rose, 572, 595
 Vansittart *v.* Vansittart, 898
 Vavasour *v.* Krupp, 7, 250, 259
 Vavasour's Case, 43
 Vernon *v.* Hallam, 888, 877
 — *v.* St. James's Vestry, 162, 226,
 229
 Vincent *v.* Spicer, 66, 72
 Viner *v.* Vaughan, 44, 45, 55
 Vipian *v.* Mortlock, 588
 Vivers *v.* Tuck, 860
 Von Heyden *v.* Neustadt, 257
 Von Joel *v.* Hornsey, 84
- WAKE *v.* Hall, 52
 Wakefield *v.* Duke of Buccleugh, 168,
 267
 — *v.* Hendron, 47
 Walcot *v.* Walker, 481
 Walford *v.* Walford, 24
 Walker *v.* Brewster, 159
 — *v.* Brown, 569
 — *v.* Clarke, 448
 — *v.* Jones, 2
 — *v.* Mottram, 888
 — *v.* Stewart, 199
 — *v.* Wilsher, 484
 — &c., & Co. *v.* Falkirk Iron
 Co., 818
 Wall *v.* London Assets Corp., 22
 — *v.* Taylor, 808, 804
 Wallace *v.* Att.-Gen., 881
 — *v.* Campbell, 527
 Wallasey Local Board *v.* Gracey, 87,
 508
 Wallis *v.* Day, 877
 — *v.* Hands, 867
 — *v.* Smith, 887, 888
 — *v.* Wallis, 588
 Wallwynn *v.* Coutts, 457
 Walsh *v.* Trevanion, 864
 Walter *v.* Ashton, 454
 — *v.* Emmott, 889
 — *v.* Howe, 800, 801, 802
 — *v.* Lane, 802, 435
 — *v.* Selfe, 140, 156
 — *v.* Steinkopff, 28, 327, 578
 Walters *v.* Green, 242—244
 — *v.* Pfeil, 176
 Walton *v.* Johnson, 50, 895, 552
 — *v.* Potter, 261
 Wandsworth Board of Works *v.* Lon-
 don and South Western
 Rly., 86, 126
 — — *v.* United
 Telephone Co., 111
 Wanzer, Ltd., *Re*, 524
 Warburton *v.* London and Blackwall
 Rly., 126

- Ward v. Byrne, 376
 — v. Countess of Dudley, 52
 — v. Duke of Buckingham, 398
 — v. Robins, 150
 — v. Society of Attorneys, 507
 — v. Ward, 150, 223
 Warder v. Stillwell, 447
 Ware v. Grand Junction Canal Co.,
 9, 392, 486
 — v. Regent's Canal Co., 19, 24, 86,
 88, 102, 120, 182, 198, 471
 Waring v. Manchester, Sheffield, and
 Lincolnshire Rly., 357
 Warne v. Laurence, 285
 — v. Routledge, 289, 365, 398
 — v. Seebohm, 306
 Warner v. Jacob, 482, 484, 485
 — v. M'Bryde, 146
 — v. Murdoch, 3
 Warren v. Brown, 142, 143
 Water v. York, 541
 Washburn Manufacturing Co. v.
 Cunard Co., 249
 Waterhouse v. Waterhouse, 587
 Waterlow v. Bacon, 22
 Waters v. Taylor, 458
 Watherell v. Howells, 48
 Watney v. Trist, 446
 Watson v. Gray, 56, 177
 — v. Lyon, 467
 — v. Troughton, 190
 Wattleworth v. Pitcher, 559
 Watts, *Ex parte*, 530
 — v. Kelson, 199, 200, 210, 211
 — v. Watts, 535
 Wanton v. Coppard, 372
 Webb v. Bird, 155, 186
 — v. Manchester and Leeds Rly.,
 88, 104
 — v. Plummer, 61, 395
 — v. Powers, 280, 282, 298
 Webster v. Dillon, 408
 — v. Manby, 574
 — v. South Eastern Rly., 86
 — v. Webster, 339
 Wedderburn v. Llewellyn, 587
 — v. Wedderburn, 528, 525
 Wedmore v. Mayor, &c., of Bristol, 162
 Weeks v. Heward, 187, 187, 202
 — v. Staker, 587
 Weeton v. Woodcock, 58, 117
 Welch v. Knott, 350
 Welcome's Trade Mark, *Re*, 337
 Weld v. Hornby, 158
 — v. South Western Rly., 102
 Weldon v. De Bathe, 540
 — v. Dicks, 277, 284, 285
 Wellesley v. Lord Mornington, 595,
 599
 — v. Wellesley, 74
 Wells, *Re*, 445
 — v. Attenborough, 378
 — v. London, Tilbury, &c., Rly.,
 210
 Welsbach Incandescent Co. v. Day-
 light Co., 271
 — v. New
 Incandescent Co., 270
 Welton v. Saffery, 484
 Wenham Gas Co. v. Champion Gas
 Co., 259
 Wenlock (Lady) v. Dee River Co., 480,
 486, 489
 Wenmouth v. Collins, 245
 West v. Francis, 308
 — v. White, 578
 West Cumberland Iron Co., *Re*, 528
 &c., Co., v.
 Kenyon, 115, 196
 Western v. M'Dermott, 18, 361—363,
 368, 406, 410, 418
 West Ham Charity Bd. v. East Lon-
 don Waterworks, 37, 38, 49, 51
 Westhead v. Keene, 250
 Westminster Association v. Upward,
 568
 — Brymbo Coal, &c., Co.
 v. Clayton, 115, 196
 Westmoreland v. New Sharlston Co.,
 169
 Weston v. Arnold, 177, 487
 — v. Metropolitan Asylum Dis-
 trict, 391
 Whaley v. Laing, 122
 Whalley v. Lancashire and Yorkshire
 Rly., 196, 198
 Whatman v. Gibson, 406
 Wheatcroft, *Re*, 438
 Wheaton v. Maple, 149, 218
 Wheeldon v. Burrows, 146, 148, 221
 Wheeler v. Gray, 178
 — and Wilson Manufacturing
 Co. v. Shakspear, 348
 Wheelwright v. Walker, 536
 Whiston v. Dean and Chapter of
 Rochester, 459, 461, 514, 515
 Whitbread v. Jordan, 487
 White v. Bass, 148
 — v. Carmarthen, &c., Rly., 480,
 482
 — v. Cohen, 124, 159
 — v. Geroch, 429
 — v. Hall, 536
 — v. Jameson, 122
 — v. Jennings, 267
 — v. M'Cann, 88
 — v. Mellin, 489
 — v. Southend Hotel Co., 369, 378,
 379, 381
 Whitehead, *Re*, 548

- Whitehead *v.* Bennett, 52, 861
 White's Charities, *Re*, 179, 281
 Whitfield *v.* Bewit, 45, 54, 56
 Whitham *v.* Westminster Brymbo Coal Co., 112, 113
 Whitley *v.* Challis, 465
 Whittaker *v.* Howe, 381, 416, 451
 Whittingham *v.* Wooler, 294
 Whiston *v.* Jennings, 253
 Whitwood Chemical Co. *v.* Hardman, 401, 402
 Whitworth *v.* Gaugain, 564
 — *v.* Rhodes, 28, 570
 Wickenden *v.* Webster, 872
 Wickens *v.* Evans, 378
 Wicks *v.* Hunt, 17, 24, 188, 198
 Wigram *v.* Fryer, 96
 Wilde *v.* Wilde, 80
 Wilding *v.* Sanderson, 588
 Wiles *v.* Gresham, 583
 Wilkins *v.* Aikin, 296
 — *v.* Wood, 49
 Wilkinson *v.* Cummins, 570
 — *v.* Haygarth, 47
 — *v.* Hull Rly. and Dock Co., 89
 — *v.* Rogers, 858, 878
 Willes *v.* Levett, 462
 Williams *v.* Bagnall, 169
 — *v.* Bingley, 449
 — *v.* Bouville, 557
 — *v.* Davies, 559
 — *v.* Day, 67
 — *v.* Duke of Bolton, 55, 74
 — *v.* Hodge, 834
 — *v.* Jersey, 27
 — *v.* James, 218, 219
 — *v.* Macnamara, 68
 — *v.* Morland, 182, 198
 — *v.* Prince of Wales Assurance Co., 420
 — *v.* Raggett, 118
 — *v.* Roberts, 16
 — *v.* Salmon, 479
 — *v.* Williams, 57, 888, 425
 Willis *v.* Childe, 460
 Willmott *v.* Barber, 27
 Wills' Trade Mark, 844
 Willson *v.* Love, 387, 391
 Wilson *v.* Church, 442, 448
 — *v.* Hart, 405, 411
 — *v.* M^cMath, 245
 — *v.* Northampton and Banbury Rly., 414
 — *v.* Townend, 117, 121, 141
 — *v.* Waddell, 196
 — *v.* Willes, 47
 Wimbledon and Putney Commissioners *v.* Dixon, 217, 220
 — Local Board *v.* Croydon Sanitary Authority, 586
 Winch *v.* Birkenhead, Lancashire, and Cheshire Rly., 106, 479, 490
 — *v.* Conservators of Thames, 233
 Winchester (Bishop of) *v.* Knight, 47
 Wing *v.* Tottenham, &c., Rly. Co., 108
 Winstanley *v.* Lee, 151
 Winterbottom *v.* Lord Derby, 87, 229
 Wintle *v.* Bristol and South Wales Rly., 88, 108
 Wither *v.* Dean and Chapter of Winchester, 68, 64, 65
 Withington L. C. *v.* Manchester Corp., 158
 Witt *v.* Corcoran, 385
 Wittman *v.* Oppenheim, 29, 278, 818, 827, 578
 Wolfe *v.* Matthews, 505
 Wolmerhausen *v.* O'Connor, 382, 384
 Wolverhampton and Walsall Rly. *v.* London and North Western Rly., 856, 897
 — Corp. *v.* Emmons, 860
 Wombwell *v.* Bellasyse, 68, 69
 Womersley, *Re*, 519
 — *v.* Dally, 868, 895
 Wood *v.* Boosey, 285, 288, 805
 — *v.* Charing Cross Rly., 86
 — *v.* Downes, 595
 — *v.* Epsom and Leatherhead Rly., 88, 89, 92, 108
 — *v.* Hamblet, 579
 — *v.* Lillies, 7, 538
 — *v.* North Staffordshire Rly., 108
 — *v.* Rowcliffe, 555
 — *v.* Saunders, 80, 116, 146, 161, 188, 190, 199, 218, 216
 — *v.* Sutcliffe, 15, 25, 26, 27, 185, 201, 859
 — *v.* Veal, 227
 — *v.* Wood, 447, 540
 — *v.* Waud, 179, 182, 185, 191, 198
 Wood's Trade Mark, *Re*, 880, 881, 882, 844
 Woodcock *v.* Oxford, &c., Rly., 567, 575
 Wooderson *v.* Tuck, 312
 Woodhouse *v.* Newry Navigation Co., 82, 88, 591
 — *v.* Walker, 51
 Woodman *v.* Robinson, 65, 245
 Woodruff *v.* Brecon and Merthyr Rly., 105
 Woodward *v.* Earl of Lincoln, 598
 — *v.* Gyles, 889
 Woodyer *v.* Hadden, 227, 280
 Woollam *v.* Ratcliffe, 354
 Woolley *v.* Broad, 819
 Woolston *v.* Ross, 465

Worcester's Case (Dean and Chapter of), 68	YAPP <i>v.</i> Williams, 567
Worsley <i>v.</i> Stewart, 49	Yard <i>v.</i> Ford, 289
— <i>v.</i> Swan, 358	Yates <i>v.</i> Jack, 140, 148, 154
Worthington <i>v.</i> Gimson, 211	Yeates <i>v.</i> Roberts, 500
Wragg <i>v.</i> Denham, 59	Yellowby <i>v.</i> Gower, 51
Wragg's Trade Mark, <i>Re</i> , 881	Yetts <i>v.</i> Norfolk Rly., 498
Wright <i>v.</i> Atkyns, 551	York and North Midland Rly. <i>v.</i> Hudson, 488
— <i>v.</i> Howard, 178, 181, 185, 187	Young <i>v.</i> Brassey, 550, 555, 559
— <i>r.</i> Simpson, 525	— <i>v.</i> Cuthbertson, 226
— <i>v.</i> Tallis, 292	— <i>r.</i> Star Omnibus Co., 224
— <i>v.</i> Wallasey Local Board, 544	— & Co. <i>v.</i> Bankier Distillery Co., 185, 196, 201, 202
— <i>v.</i> Williams, 187	— Manufacturing Co., <i>Re</i> , 560
Wrixon <i>v.</i> Condran, 84	Yovatt <i>v.</i> Winyard, 420, 425
Wyatt <i>v.</i> Barnard, 291, 299	Ystalyfera Iron Co. <i>v.</i> Neath and Brecon Rly., 98, 100, 101
Wylam <i>v.</i> Clarke, 80, 855	
Wyndham <i>v.</i> Way, 41	
Wynne <i>v.</i> Lord Newborough, 551	

ADDENDA.

- Page 7 Notes (n) (o). *Devonport v. Tozer* is reported on appeal in W. N. (1903) 38.
 Add at end of this page, the words—"unless the Att.-Gen. is a party."
 In note (o). Add "*Att.-Gen. v. Ashbourne Recreation Ground*, (1903) 1 Ch. 101, 107."
- „ 11 After line 14 add—
 "An action in which an injunction only is claimed is within the jurisdiction of a County Court, provided that the case is one in which, if there had been a claim for damages, the claim must have been for the amount within the jurisdiction of the County Court. *Stiles v. Ecclestone*, (1908) 1 K. B. 544."
- „ 14 Note (g). After *Stevens v. Chown*, add "*Att.-Gen. v. Ashbourne Recreation Ground*, (1903) 1 Ch. 101, 107. *Devonport v. Tozer*, (1902) 2 Ch. 182, is now reported on appeal, W. N. (1903) 38."
- „ 81 Note (r). *Rivington v. Garden*, (1901) 1 Ch. 61, should be "(1901) 1 Ch. 561."
- „ 87 Note (l). Add "*Boyce v. Paddington Borough Council*, (1908) 1 Ch. 109."
- „ 111 Note (g). "The decision in *Finchley Electric Light Co.*, (1902) 1 Ch. 866, was reversed on appeal, (1903) 1 Ch. 487; and the decision of the Court of Appeal supports the statement in the text."
- „ 119 Note (i). Add "*Boyce v. Paddington Borough Council*, (1908) 1 Ch. 109."
- „ 126 Note (i). Add "And see *Roberts v. Charing Cross, &c., Ry. Co.*, W. N. (1903) 18."
- „ 128 Note (p). Add "See the Electric Lighting (Clauses) Act, 62 & 68 Vict. c. 19, sched. sect. 81, which provides that—'Nothing in the Special Order shall exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused or permitted by them.'"
- „ 185 Note (a). Add "See *ante*, pp. 7 and 14. *Devonport v. Tozer* is now reported on appeal in W. N. (1903) 38."
- „ 188 Note (s). *Devonport v. Tozer*, (1902) 2 Ch. 102, is now reported on appeal in W. N. (1903) 38.
- „ 149 Note (e). Add "See *Easton v. Isted*, (1908) 1 Ch. 405, as to employment 'by consent or agreement.'"
- „ 151 Note (u). Add "See also *Easton v. Isted*, (1908) 1 Ch. 405."
- „ 281 Note (p). *Mappin Brothers v. Liberty & Co., Limited*, is now reported (1903) 1 Ch. 118.

- Page 289 Note (s). *Att.-Gen. v. Ashbourne Recreation Ground*, W. N. (1902) 208, is now reported (1908) 1 Ch. 101. Add "See also pp. 7, 14, ante."
- „ 247 Note (g). End of last paragraph—
Add "But see *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1908) 1 K. B. 118, as to the liability of a person who gives honest and *bonâ fide* advice to another which induces him to break a contract of service with a third person."
- „ 301 Note (r). *Aflalo v. Lawrence* is now reported on appeal in (1908) 1 Ch. 818.
- „ 336 Note (b). Add "*Re Bourne's Trade Mark*, (1908) 1 Ch. 211."
- „ 374 Note (k). Add "Cf. *Bickmore v. Dimmer*, (1908) 1 Ch. 158 (C.A.)."
- „ 462 Note (e). Add "As to selling after order *nisi* for foreclosure, see *Stevens v. Theatres, Limited*, W. N. (1908) 68, *post*, p. 588."
- „ 478 Note (f). After *Kyshe v. Alturas*, add "*Turnbull v. West Riding Athletic Club*, W. N. (1894) 4."

A TREATISE

ON THE

LAW AND PRACTICE OF INJUNCTIONS.

CHAPTER I.

INJUNCTIONS IN GENERAL.

An injunction was under the old procedure a writ issuing by order and under seal of the Court of Chancery. A writ of injunction may be described as a judicial process whereby a party was required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ. The process, however, was rather preventive than restorative, though it was by no means confined to the former object. When commanding an act to be done, it issued after decree, and was in the nature of an execution to enforce the same; as, for instance, it might contain a direction to the party defendant to yield up or to quit or continue the possession of the land or other property which constituted the subject-matter of the decree in favour of the other party (a).

Under the present procedure no writ of injunction is to issue. An injunction is by judgment or order, and such judgment or order has the effect which a writ of injunction previously had (b).

Injunctions are either *interlocutory* or *perpetual*. *Interlocutory injunctions* are such as are to continue until the hearing of

(a) Gilb. For. Rom., ch. 11, pp. 180; 9 R. R. 148, 276.
194, 195; *Stribley v. Hawke*, 3 Atk. (b) Ord. L. r. 11.
275; *Huguenin v. Basley*, 15 Ves.

Chap. I. — the cause upon the merits, or generally until further order.
 Perpetual injunctions. *Perpetual injunctions* are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right or perpetually restrained from the commission of an act which would be contrary to equity and good conscience (c). The perpetual injunction is in effect a decree, and concludes a right.

Interlocutory injunction. The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order. In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime *in statu quo*. A man who comes to the Court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of (d).

(c) Gilb. For. Rom. 194 195.

(d) *Glascott v. Lang*, 3 M. & C. 451, 455; *Hilton v. Lord Granville*, Cr. & Ph. 283, 292; *Great Western Railway Co. v. Birmingham and*

Oxford Junction Railway Co., 2 Ph.

597, 603; *Dyke v. Taylor*, 3 D. F. & J. 467; *Walker v. Jones*, L. R. 1 P. C. 50, 61; *Preston v. Luck*, 27 C. D. 505, 506, *per Cotton*, L.J.

CHAPTER II.

THE NATURE AND LIMITS OF THE JURISDICTION OF THE HIGH COURT OF JUSTICE BY INJUNCTION.

UNDER the former procedure, the jurisdiction by injunction to restrain the doing of wrongful acts was a jurisdiction which could only be exercised by the Court of Chancery. The Courts of common law had by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 (*a*), been empowered to grant injunctions in particular cases; and by the 15 & 16 Vict. c. 88, had been empowered to grant injunctions in patent cases; but until the Judicature Act, 1873, the remedy by injunction continued to be, with these exceptions, a remedy peculiar to the Court of Chancery. By that Act, 36 & 37 Vict. c. 66, s. 16, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice (*b*); and by sect. 25, sub-sect. 8, it is declared that :

“ A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.”

This enactment (*c*) does “not confer an arbitrary or an unregulated discretion on the Court” (*d*). It does “not mean that the Court is to grant an injunction simply because it thinks it convenient. It means that the Court should grant an injunction for the protection of rights or the prevention of

Chap. II.

Jurisdiction
formerly
confined to
Chancery.

Sect. 25,
sub-sect. 8, of
Judicature Act,
1873.

The effect of
sect. 25, sub-sect.
8, of the Judi-
cature Act,
1873.

(*a*) Sections 81, 82. These sections have been repealed by the Statute Law Revision Act, 1883.

(*b*) See *Warner v. Murdoch*, 4 Ch. D. 752.

(*c*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*d*) *Harris v. Beauchamp Bros.*, (1894) 1 Q. B. p. 809 (C. A.).

Chap. II.

injury according to legal principles" (e). This sub-section (f) does not enable the Court to issue an injunction in a case in which before the Act there was no legal right on the one side or no legal liability on the other side, either at law or in equity (g). It was not intended by the enactment "to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the Court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction, altering therefore not in any way the rights of parties, so as to give a right to those who had no legal right before, but enabling the Court to modify the principle on which it had previously proceeded in granting injunctions, so that where there is a legal right the Court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties. . . . All that was done by this section was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights, which according to law were previously existing and capable of being enforced in some or one of the different divisions which are now united in the High Court. . . . The sole intention of the section is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right" (h).

As was said in a recent case, the enactment in question "has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used

(e) *Per* Jessel, M.R., in *Aslatt don Railway Co. v. Great Northern v. Corporation of Southampton*, 16 *Railway Co.*, 11 Q. B. D. p. 38. C. D. p. 148.

(f) 36 & 37 Vict. c. 66, s. 25, sub-s. 8. (h) *Per* Cotton, L.J., in *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 39, 40.

(g) *Per* Brett, L.J., in *North Lon-*

not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so " (j).

Chap. II.

It was not the practice of the old Court of Chancery to interfere by injunction where there was a legal right in question which was being put in course for trial at law. Accordingly in *Reg. v. Mayor of Dover* (k), the Court of Queen's Bench decided, two years after the issue of the writ and a year after the mayor had left office, that he had no right to be mayor at all. But under the Judicature Act it seems that where independently of that Act there is a right that can be asserted either at law or in equity, the Court can grant an injunction whether interlocutory or perpetual in protection of the right (l).

Accordingly, in *Aslatt v. Mayor of Southampton* (m), although there was a remedy at law by *quo warranto* and before the Judicature Act an injunction would not have been granted, the Court restrained the corporation by injunction from declaring the plaintiff's office void, on the ground that the injunction was required in order to do effectual justice. So also in *Stannard v. Vestry of St. Giles* (n), and in *Hedley v. Bates* (o), where there was before the Judicature Act a right to apply to a Court of common law for a prohibition, Jessel, M.R., when he had the parties before him, instead of sending them to get a prohibition, granted an injunction against the person who was seeking to go before the wrong tribunal.

Again, the Court will, since the Judicature Act, in a proper case, restrain the publication of a libel (q); or the making of slanderous statements calculated to injure another in his business (r). But it is only in the clearest cases of libel or

(j) *Cummins v. Perkins*, (1899) 1 Ch. p. 20, per Lindley, M.R. See, however, *Kitts v. Moore*, (1895) 1 Q. B. 253 (C. A.).

(k) Cited by Jessel, M.R., in *Aslatt v. Mayor of Southampton*, 16 C. D. p. 148.

(l) *Richardson v. Methley School Board*, (1893) 3 Ch. 510.

(m) 16 C. D. 148.

(n) 20 C. D. 190.

(o) 13 C. D. 498.

(q) *Thomas v. Williams*, 14 C. D. 864; *Quartz Hill, &c., Mining Co. v. Beall*, 20 C. D. 501; *Hayward v. H.*, 34 C. D. 198.

(r) *Looy v. Bean*, 26 C. D. 306.

Chap. II.

Judicature Acts have not altered the principles on which injunctions are granted.

slander that the Court will interfere by injunction, and especially by interlocutory injunction (*s*).

The Judicature Acts, however, have not altered the principles on which the Court acts in granting injunctions where principles have been established as just and convenient (*t*). "The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy" (*u*). Nor will an injunction be granted where the case is one, not of legal injury, but of mere inconvenience (*x*). Moreover, an injunction will not be granted in a trivial case (*y*), nor where the plaintiff has the remedy in his own hands (*z*).

It was not the function or practice of the Court of Chancery to restrain men from prosecuting frivolous, litigious or desperate suits merely because they are so (*a*). Nor has the Court under the Judicature Acts jurisdiction to interfere by injunction upon a false assumption of authority. The Court has no general jurisdiction to restrain persons from acting without authority and an injunction cannot be granted to restrain a person from taking proceedings out of Court in the name of a person who had given no authority to use it (*b*).

In like manner, the Court has no jurisdiction to restrain a party from proceeding with an arbitration in a manner not authorised by the agreement to refer, although such arbitration may be futile and vexatious (*c*). But the Court will, in a proper case, restrain a party from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement to refer (*d*).

(*s*) *Bonnard v. Perryman*, (1891) 2 Ch. 269 (C. A.); and see *Monson v. Tussaud's Ltd.*, (1894) 1 Q. B. 671 (C. A.).

(*t*) *Gaskin v. Balls*, 13 Ch. D. 329, per Thesiger, L.J.

(*u*) *Per Lindley, L.J.*, in *London and Blackwall Railway Co. v. Cross*, 31 C. D. p. 369.

(*x*) *Day v. Brownrigg*, 10 C. D. 294.

(*y*) *Llandudno Urban Council v. Woods*, (1899) 2 Ch. 705.

(*z*) *Elliman v. Carrington*, (1901) 2 Ch. 275, 279.

(*a*) *Pennell v. Roy*, 3 D. M. & G. 133, per Knight-Bruce, L.J.

(*b*) *London and Blackwall Railway Co. v. Cross*, 31 Ch. D. 354.

(*c*) *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 30 (C. A.); and see *Wood v. Lillies*, 61 L. J. Ch. 158.

(*d*) *Kitts v. Moore*, (1895) 1 Q. B. 253 (C. A.).

The Court has no jurisdiction to interfere with the public duties of any of the departments of Government (*e*), or with the sovereign acts of a foreign government (*f*), or to enforce the contracts of a foreign government against the property of such government in England (*g*), or to prevent a foreign sovereign from removing his property in this country (*h*), or to make a decree against a foreign ambassador who does not submit to the jurisdiction (*i*).

Chap. II.

No jurisdiction to interfere with public duties of a department of Government, &c.

The Court will not interfere by injunction in matters merely criminal or immoral, which do not affect any right to property (*k*). But if an act which is criminal touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property (*l*).

No jurisdiction in matters merely criminal or immoral;

The Court will not, it seems, interfere by injunction to prevent criminal proceedings being taken against a person who is defendant to a pending action, notwithstanding that the criminal proceedings and the action are both based on the same wrongful act (*m*). And the Court will not (unless in very special circumstances) interfere by declaration of right or injunction in cases where the Legislature has pointed out a mode of procedure before a magistrate (*n*). Accordingly, it seems that a local authority, whose bye-laws may be enforced before a magistrate, cannot enforce the same by an injunction (*o*).

(*e*) See *Ellis v. Grey*, 6 Sim. 214, 223; 38 R. R. 93.

(*f*) *Gladstone v. Ottoman Bank*, 1 H. & M. 505.

(*g*) *Smith v. Weguelin*, 8 Eq. 198; *Twycross v. Dreyfuss*, 5 Ch. D. 605.

(*h*) *Vavasour v. Krupp*, 9 Ch. D. 351.

(*i*) *Gladstone v. Musurus Bey*, 1 H. & M. 495.

(*k*) *Att.-Gen. v. Sheffield Gas Co.*, 5 D. M. & G. p. 320; *Emperor of Austria v. Day*, 3 D. F. & G. p. 253.

(*l*) *Macaulay v. Schakell*, 1 Bligh,

N. S. p. 127; *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 320; *Emperor of Austria v. Day*, 3 D. F. & J. 253; *Mogul Steam Ship Co. v. Macgregor*, 15 Q. B. D. 476.

(*m*) *Saull v. Browne*, 10 Ch. 64; *Kerr v. Mayor, &c., of Preston*, 6 C. D. 463.

(*n*) *The Grand Junction Waterworks Co. v. Hampton*, (1898) 2 Ch. 331; *Devonport Corporation v. Tozer*, (1902) 2 Ch. 182. Cf. *Stevens v. Chown*, (1901) 1 Ch. 894.

(*o*) *Devonport Corporation v. Tozer*, ante.

Chap. II.

In the winding up of a company, however, the Court has jurisdiction under sect. 85 of the Companies Act, 1862, to restrain by injunction *quasi* criminal proceedings which are being taken against the company to recover penalties (*p*). So also where a petition has been presented for winding up a company, the Court has jurisdiction under sect. 85 to restrain proceedings on a summons for enforcing poor rates owing by the company (*q*).

or in political
matters.

Matters of a political nature do not come within the jurisdiction of the Court. The Court will not interfere with the view of preventing revolution in a foreign country, or in favour either of the prerogative of a foreign sovereign or the political rights of his subjects or in aid of the revenue laws of a foreign country. But if a case of injury to the property of a foreign sovereign or his government or his subjects be made out, the Court has jurisdiction to interfere at the suit of a foreign sovereign (*r*).

Interference in
favour of the
laws of another
country.

Nor will the Court interfere in favour of any laws of a foreign country which are in conflict with our own laws on subjects of religion and morality (*s*). Where the Courts of one country are called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the laws of that country (*t*), for if any part of the contract is inconsistent either with the law or policy of the former, the contract will not be enforced even as to another part of it which would not be open to objection, and may be the only part remaining to be performed (*u*).

In granting injunctions the Court operates *in personam*. The person to whom its orders are addressed must be within the reach of the Court or amenable to its jurisdiction. But the Court will not suffer anyone within its reach to do what is contrary to its notions of equity, merely because

(*p*) *Re Briton, &c., Life Association*, 32 Ch. D. 503.

(*q*) *Re Flint, &c., Co.*, 56 L. J. Ch. 232.

(*r*) *Emperor of Austria v. Day*, 3 D. F. & J. 217; *United States v. Prioleau*, 2 H. & M. 559; 2 Eq. 659.

(*s*) *Emperor of Austria v. Day*, 3 D. F. & J. p. 242.

(*t*) *Rousillon v. R.*, 14 C. D. 351, 369.

(*u*) *Hope v. H.*, 8 D. M. & G. 731; but see *Quarrier v. Colston*, 1 Ph. 147.

the act to be done may be, in point of locality, beyond its jurisdiction (x). Chap. II.

Injunction
operates in *per-*
sonam.

As a consequence of the rule, that in granting an injunction the Court operates *in personam*, the Court may exercise jurisdiction independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the Court. This jurisdiction is not grounded upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person to whom the order is addressed being within the reach of the Court (y). But an English Court will not pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie, would probably be treated as a *brutum fulmen* (z). Nor, it seems, will the Court entertain an action which directly raises the question of the title to land situate abroad (a). Moreover, where a matter in dispute is being litigated in a foreign Court which has the means of deciding upon and enforcing the rights of the parties, the Court here will not, in general, interfere (b).

Upon the principle that the Court acts *in personam* in granting an injunction, it appears that it has power, upon a proper case being made out, to restrain a man from applying to Parliament (c). But the jurisdiction will only be exercised under very exceptional circumstances (d). The Court cannot, however, restrain a man from applying for a grant to a foreign sovereign, nor, after the grant is made, can the Court prevent

(x) *The Carron Iron Co. v. Mac-laren*, 5 H. L. C. 416, 436.

(y) *Lord Portarlington v. Soulby*, 3 M. & K. p. 108; 41 R. R. 23; *Carron Iron Co. v. Mac-laren*, 5 H. L. C. 436.

(z) *Norris v. Chambres*, 3 D. F. & J. p. 584.

(a) *Companhia de Mocambique v. British South Africa Co.*, (1892) 2 Q. B. 358; (1893) A. C. 602.

(b) *Norris v. Chambres*, 3 D. F.

& J. 583; and cf. *Fletcher v. Rodgers*, 27 W. R. 97, and *Hyman v. Helm*, 24 C. D. 531.

(c) *Ware v. Grand Junction Railway Co.*, 2 R. & M. 483; 34 R. R. 136; *Heathcote v. North Staffordshire Railway Co.*, 2 Mac. & G. 109; *Stockton and Hartlepool Railway Co. v. Leeds and Thirsk Railway Co.*, 2 Ph. 666, 670.

(d) *Ib.*; *Steele v. North Metropolitan Railway Co.*, 2 Ch. 237.

Chap. II.

a man from using the grant made by the same sovereign authority. The fact that the grant so made may be inconsistent with a grant previously made by the same sovereign authority does not give a man any equity to apply to the Court (e).

Injunction does not run with the land.

An injunction being an order directed to a person, it does not run with the land (f).

Injunctions to restrain actions at law abolished.

Under the former procedure, the Court of Chancery had jurisdiction to restrain by injunction an action at law in all cases where the defendant to the action could show that he had a good equitable defence. But this jurisdiction has been abolished by the Judicature Act, 1873 (g). It is there declared that no cause or proceeding, at any time pending in the High Court of Justice or before the Court of Appeal, shall be restrained by prohibition or injunction, but that every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto (h).

Although the Court has no longer jurisdiction to restrain a pending action, an injunction may be granted to restrain the institution of proceedings in the High Court of Justice (i).

Prerogative of Crown not affected by the Judicature Acts.

The prerogative of the Crown to intervene in actions affecting the right and revenue of the Sovereign has not been affected by the Judicature Acts (k); and the proper tribunal for the determination of such matters is the Revenue side of the King's Bench Division of the High Court of Justice (l).

Jurisdiction of County Court by injunction.

A County Court has under the Judicature Act, 1873, s. 89, in actions within its jurisdiction, power to grant an injunction,

(e) *Gladstone v. Ottoman Bank*, 1 H. & M. 505.

(f) *Att.-Gen. v. Birmingham, &c., Drainage Board*, 17 C. D. 685, 692; *Att.-Gen. v. Dorking*, 20 C. D. 595.

(g) 36 & 37 Vict. c. 66, s. 24, sub-s. 5; see *Garbutt v. Faucus*, 1 Ch. D. 155.

(h) See *In re Artistic Colour Printing Society*, 14 C. D. 502.

(i) *Besant v. Wood*, 12 Ch. D. 630; and see *Cercle Restaurant, &c., Co. v. Lavery*, 18 Ch. D. 555; and *In re A Company*, (1894) 2 Ch. 349.

(k) *Att.-Gen. v. Constable*, 4 Exch. D. 172.

(l) *Lord Stanley of Alderley v. Wild and Son*, (1900) 1 Q. B. 256 (C. A.).

whether interlocutory or perpetual (*m*), and can enforce obedience by committal (*n*). But the County Court has no power to restrain the infringement of a patent if its validity is disputed (*o*), and it has been doubted whether the County Court can grant an injunction to restrain a threatened injury where no damage has been sustained (*p*). Where the only question before the Court is whether an injunction shall be granted or not, an appeal lies without leave, notwithstanding sect. 120 of the County Courts Act, 1888 (*q*).

It has been held that sect. 116, sub-sect. 2 of the County Courts Act, 1888, which deprives a plaintiff of costs who brings an action founded on tort in the High Court and recovers less than 10*l.* damages, does not apply where the main relief sought is an injunction (*r*).

In any cause or matter in which an injunction has been or might have been granted, the plaintiff may before or after judgment apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract, and the Court or a judge may grant the injunction either upon or without terms as may be just (*s*).

(*m*) *Richards v. Cullerne*, 7 Q. B. D. 623.

(*n*) *Martin v. Bannister*, 4 Q. B. D. 491.

(*o*) *Reg. v. Halifax C. C.*, (1891) 2 Q. B. 263.

(*p*) *Martin v. Bannister*, *supra*.

(*q*) *Brune v. James*, (1898) 1 Q. B. 417.

(*r*) *Keates v. Woodward*, (1902) 1

K. B. 532 (C. A.).

(*s*) Ord. L. r. 12.

Injunction
against repeti-
tion of wrongful
act or breach of
contract.

CHAPTER III.

INJUNCTIONS AGAINST THE VIOLATION OF COMMON LAW RIGHTS.

SECTION 1.—THE PROTECTION OF LEGAL RIGHTS TO PROPERTY PENDING LITIGATION.

Chap. III.
Sect. 1.
Protection of
legal rights
pending litigation.

THE jurisdiction of the High Court of Justice by injunction is not confined to the protection of equitable rights, but extends to the protection of legal rights to property from damage pending litigation. The protection of legal rights to property from irreparable or at least from serious damage pending the trial of the legal right was part of the original and proper office of the Court of Chancery (*a*). In exercising the jurisdiction the Court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established (*b*). The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right can be ascertained (*c*). The office of the Court to interfere being founded on the existence of the legal right, a man who seeks the aid of the Court must be able to show a fair *prima facie* case in support of the title which he asserts (*d*). He is not required to make out a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets

(a) *Hilton v. Lord Granville*, Cr. & Ph. 283, 292.

(b) *Harman v. Jones*, Cr. & Ph. 299, 301.

(c) *Ib.*

(d) *Saunders v. Smith*, 3 M. & C. 714, 728; 45 R. R. 367; *Hilton v. Lord Granville*, Cr. & Ph. 283, 292.

up (e), and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent (f). The Court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit (g). The mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction, though it is always a circumstance which calls for the attention of the Court (h). Where the question of right had been decided in the plaintiff's favour in a Court of law, the fact that an appeal was pending was held to be no ground for a Court of equity refusing an injunction, unless the Court doubted the correctness of the decision at law (i). But the pendency of the appeal might be a ground for the Court postponing the operation of the injunction (k).

If the legal right is not disputed, a man who seeks the aid of the Court must be able to show that the act complained of is in fact a violation of the right, or is at least an act which, if carried into effect, will necessarily result in a violation of the right (l). The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done, is not sufficient (m); but if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives

A case of actual or threatened violation of the right should be made out.

(e) *Shrewsbury and Chester Railway Co. v. Shrewsbury and Birmingham Railway Co.*, 1 Sim. N. S. 410, 426.

(f) *Sparrow v. Oxford, Worcester, and Wolverhampton Railway Co.*, 9 Ha. 436, 441.

(g) *Att.-Gen. v. Mayor of Wigton*, 5 D. M. & G. 52.

(h) *Ollendorf v. Black*, 4 De G. & S. 211.

(i) *Att.-Gen. v. Proprietors of Bradford Canal*, 2 Eq. 71.

(k) 2 Eq. pp. 79, 84.

(l) *Earl of Ripon v. Hobart*, 3 M. & K. 169, 176; 41 R. R. 40; *Haines v. Taylor*, 10 Beav. 471; 2 Ph. 209; *Pattison v. Gilford*, 18 Eq. 259; *Goodhart v. Hyett*, 25 Ch. D. 190; *Fletcher v. Bealey*, 28 C. D. 688.

(m) *Earl of Ripon v. Hobart*, 3 M. & K. 174; 41 R. R. 40; *Haines v. Taylor*, 10 Beav. 75; 2 Ph. 209; *Att.-Gen. v. Corporation of Manchester*, (1893) 2 Ch. 87, 91, where the principles on which the Court proceeds in granting or refusing injunctions *quia timet* are discussed.

Chap. III.
Sect. 1.

notice of his intention to do an act which must, in the opinion of the Court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction (*n*). The mere denial by a man of his intention to do an act or to infringe a right will not prevent the Court from interfering (*o*); but if a man who claims a right to do a certain act asserts positively that before proceeding to do the act, he will give notice of his intention to do it, and there is no reason to doubt the truth of his assurance, the Court will not interfere (*p*).

Right to relief
not excluded by
imposition of
penalties.

It has been held that where a statute provides a particular remedy for the infringement of a *right of property* thereby created, the jurisdiction of the High Court to protect the right by injunction is not excluded, unless the statute expressly so provides (*q*).

Irreparable
damage.

A man who seeks the aid of the Court by way of interlocutory injunction, must, as a rule (*r*), be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial (*s*). By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a material one, and not adequately reparable by damages (*t*); and by the term "the inadequacy of the remedy by damages" is meant that the remedy by damages is not such a compensation as will in effect, though

(*n*) *Att.-Gen. v. Forbes*, 2 M. & C. p. 132; 45 R. R. 15; *Tipping v. Eckersley*, 2 K. & J. 264, 270; *Hext v. Gill*, 7 Ch. 699, 711; *Cooper v. Whittingham*, 15 Ch. D. 501; *Phillips v. Thomas*, 62 L. T. 793.

(*o*) *Jackson v. Cator*, 5 Ves. 688; 5 R. R. 144; *Potts v. Levy*, 2 Drew, 272, 279; *Adair v. Young*, 12 Ch. D. 19.

(*p*) *Lord Cowley v. Byas*, 5 Ch. D. 950.

(*q*) *Stevens v. Chown*, (1901) 1 Ch. 894. Compare with this case *Devonport Corporation v. Tozer*, (1902) 2 Ch. 182.

(*r*) As to cases where an injunction is claimed against the breach of an express covenant, see *post*, Chap. X. s. 1.

(*s*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Johnson v. Shrewsbury and Birmingham Railway Co.*, *ib.* p. 931; *Dyke v. Taylor*, 3 D. F. & J. 467.

(*t*) *Pinchin v. London and Blackwall Railway Co.*, 5 D. M. & G. p. 860; *East Lancashire Railway Co. v. Hattersley*, 8 Ha. p. 90; *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 320; *Bloxam v. Metropolitan Railway*, 3 Ch. p. 354.

not *in specie*, place the parties in the position in which they formerly stood (*u*). If the act complained of threatens to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured (*x*). The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage (*y*); but although the amount of damage may be difficult to ascertain, a man who has on a previous occasion compromised his rights against other parties by accepting a sum of money, may preclude himself from saying that the damage is irreparable, and cannot be compensated by money (*z*). It is, however, no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is, whether the remedy by damages is, under the circumstances of the case, full and complete (*a*). "A person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf" (*b*).

The jurisdiction of the Court to interfere by way of interlocutory injunction in support of a legal title being purely equitable, it is governed upon strict equitable principles. The Court, where its summary interference is invoked, always looks to the conduct of the party who makes the application, and will refuse to interfere, even in cases where it acknowledges a right, unless his conduct in the matter has been fair and honest, and free from any taint of fraud or illegality (*c*).

Conduct of the party who seeks the aid of the Court must be fair and honest.

(*u*) *Wood v. Sutcliffe*, 2 Sim. N. S. p. 165.

(*x*) *Hilton v. Lord Granville*, Cr. & Ph. 283, 292.

(*y*) *Cory v. Yarmouth and Norwich Railway Co.*, 3 Ha. 603.

(*z*) *Wood v. Sutcliffe*, 2 Sim. N. S. 168, 169; *Dowling v. Betjeman*, 2 J. & H. p. 544; *Ormerod v. Todmorden, &c., Mill Co.*, 11 Q. B. D. 162. But see *Ainsworth v. Bentley*, 14 W. R. 630, 632.

(*a*) See *Lumley v. Wagner*, 1 D. M. & G. 604, 616; and *Ryan v. Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. p. 128; *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 237, 238.

(*b*) Per Smith, L.J., in *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. p. 322.

(*c*) *Blakemore v. Glamorganshire Railway Co.*, 1 M. & K. p. 168; 36 R. R. 289; *Great Western Railway*

Chap. III.
Sect. 1.
Acquiescence.

Parties who, possessing full knowledge of their rights, have lain by, and by their conduct have encouraged others to expend moneys or alter their condition in contravention of the rights for which they contend, cannot call upon the Court for its summary interference (*d*). Acquiescence by one of several co-plaintiffs in the act complained of precludes the interference of the Court by injunction; and the rule is the same although some of the plaintiffs are infants (*e*). The principle applies with peculiar force where the property on which the moneys are expended is mineral property (*f*), or property of a speculative character (*g*), or if the act complained of is caused by a public company in the execution and construction of their works. As the injury to a company in being stayed (if it shall ultimately turn out that they are acting lawfully) is great in proportion to the magnitude of their operations, the Court will in general hold even slight acquiescence on the part of the complainant a bar to relief (*h*). The extent of the expenditure is to a certain degree the measure of the acquiescence (*i*).

In order to justify the application of the principle, it must clearly appear that the party against whom acquiescence is alleged was aware of his rights, and by his conduct encouraged the other party to alter his condition, and that the latter acted upon the faith of the encouragement so held out (*k*). There is no acquiescence if an act has been permitted, or expenditure

Co. v. Oxford, Worcester, and Wolverhampton Railway Co., 3 D. M. & G. p. 359; *Williams v. Roberts*, 8 Ha. 326, 327.

(*d*) *Great Western Railway Co. v. Oxford, Worcester, and Wolverhampton Railway Co.*, 3 D. M. & G. p. 359; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; 16 Beav. 630; *Davies v. Sear*, 7 Eq. 427.

(*e*) *Marker v. Marker*, 9 Ha. 1, 15.

(*f*) *Clegg v. Edmondson*, 8 D. M. & G. 787; *Ernest v. Vivian*, 33 L. J. Ch. 513.

(*g*) See *Crossley v. Derby Gas*

Light Co., Webst. P. C. 120; *Neilson v. Thompson*, ib. 275.

(*h*) *Greenhalgh v. Manchester and Birmingham Railway Co.*, 3 M. & C. 784; 45 R. R. 393.

(*i*) *Great Western Railway Co. v. Oxford, Worcester, &c., Railway Co.*, 3 D. M. & G. 341, 361.

(*k*) *Marker v. Marker*, 9 Ha. p. 16; *Greenhalgh v. Manchester and Birmingham Railway Co.*, 3 M. & C. 791; 45 R. R. 393; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Russell v. Watts*, 25 Ch. D. p. 576; *Proctor v. Bennis*, 36 Ch. D. 740.

has been allowed to be made under an erroneous opinion and view, and in ignorance of the consequences (*l*).

Chap. III.
Sect. 1.

The acquiescence of an agent, when acting within the scope of his authority, is binding on the principal; but in order that it should be binding the agent must be acting within the scope of his authority (*m*). A corporation or company may be bound by acquiescence as well as an individual (*n*).

The conduct and dealings of a man with others than the party with whom the contest exists may constitute a case of acquiescence, so as to preclude him from coming to the Court for relief against a state of things to which his own conduct has led (*o*). Where, accordingly, the owners of a canal had permitted several persons to supply their mills with water for several purposes, the Court would not restrain a man who had been allowed to lay down pipes to the canal from using the water in the same way as his neighbours (*oo*).

The mere objection to, or a mere protest on the part of the plaintiff against, the act of the defendant, or a mere threat to take legal proceedings, is not in general sufficient to exclude the consequences of laches or acquiescence (*p*). Nor will the continual assertion of a claim, unaccompanied by any act to give effect to it, keep alive a right which would be otherwise precluded (*q*). But if moneys are expended after full and distinct notice that the work is objected to, and that steps will be taken to prevent it (*r*), or with full knowledge of the true condition of the title (*s*); or if the acquiescence is satis-

Acquiescence.

(*l*) *Bunkart v. Houghton*, 27 Beav. 425, 431.

(*m*) See *Att.-Gen. v. Briggs*, 1 Jur. N. S. 1084; *Miles v. Tobin*, 16 W. R. 465.

(*n*) *Laird v. Birkenhead Railway Co.*, John. 500; *Hill v. South Staffordshire Railway Co.*, 11 Jur. N. S. 192.

(*o*) *Rundell v. Murray*, Jac. p. 316; 23 R. R. 75; *Saunders v. Smith*, 3 M. & C. 711, 730; 45 R. R. 367.

(*oo*) *Rochdale Canal Co. v. King*, 2 Sim. N. S. 87.

(*p*) *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; 11 R. R. 245; *Wicks v. Hunt*, John. 372.

(*q*) *Clegg v. Edmondson*, 8 D. M. & G. 808; *Lehmann v. Macarthur*, 3 Ch. 496.

(*r*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 328; *Rochdale Canal Co. v. King*, 16 Beav. p. 643; *Lord Manners v. Johnson*, 1 Ch. D. 679.

(*s*) *Rennie v. Young*, 2 D. & J. 136, 142; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Proctor v. Bennis*, 36 C. D. p. 760.

Chap. III.
Sect. 1.

factorily accounted for and explained (*t*), as for instance, that it has taken place upon the faith of a representation that no grievance would result from or be produced by the act (*u*), or upon the faith that negotiations were going on between the parties with a view to the settlement of the dispute on points in contest between them (*x*); or if the party against whom acquiescence is alleged was justified in assuming that his rights would not be affected (*y*); or if the delay is while the acts done are preliminary to the acts against which he claims relief, and not such acts themselves (*z*); the consequences of acquiescence are excluded. Nor will a man be precluded from relief on the ground of acquiescence in what he was led to consider a mere temporary violation of his right (*a*). Nor does the acquiescence in a state of things which produces little injury warrant the subsequent extension of them to an extent productive of serious damage (*b*).

Acquiescence.

A less strong degree of acquiescence is sufficient to disentitle a party to an interlocutory injunction than is required to debar him from relief at the hearing of the cause. In dismissing a bill upon interlocutory application, the Court does not conclude a right, but merely refuses, in the exercise of its discretion, to interfere summarily in favour of a party who has not shown due diligence in making the application (*c*). "A short acquiescence," said Lord Langdale, in *Gordon v. Cheltenham Railway Company* (*d*), "may properly induce the Court not to interfere

(*t*) *Goldsmid v. Tunbridge Wells Commissioners*, 1 Ch. 349; *Att.-Gen. v. Corporation of Halifax*, 17 W. R. 1088; *Coles v. Simms*, 5 D. M. & G. 1.

(*u*) *Davies v. Marshall*, 10 C. B. N. S. 711.

(*x*) *Innocent v. Midland Railway Co.*, 1 Ra. Ca. 242, 256.

(*y*) *Att.-Gen. v. Leeds Corporation*, 5 Ch. 594; *Smith v. Smith*, 20 Eq. p. 503.

(*z*) *Northam Bridge and Roads Co. v. London and South Western Railway Co.*, 1 Ra. Ca. 653.

(*a*) *Gordon v. Cheltenham Railway Co.*, 5 Beav. 229, 238; *Att.-Gen. v. Luton Board of Health*, 2 Jur. N. S. 182; *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 546.

(*b*) *Bankart v. Houghton*, 27 Beav. 425; *Western v. M'Dermott*, 2 Ch. 72; *Att.-Gen. v. Corporation of Halifax*, 17 W. R. 1088; and see *Knight v. Simmonds*, (1896) 1 Ch. 653; (1896) 2 Ch. 294.

(*c*) *Johnson v. Wyatt*, 2 D. J. & S. 18, 25; *Child v. Douglas*, 5 D. M. & G. 739, 741.

(*d*) 5 Beav. 233.

ex parte. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by interlocutory order even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must be assumed that the plaintiff had originally a right, but that he has altogether deprived himself of it by acquiescence."

A man may by his acquiescence preclude himself not only from coming to the Court for an injunction, but from obtaining damages (*e*).

Delay, though it may not amount to proof of acquiescence, Delay. may be sufficient to disentitle a man to the summary interference of the Court by interlocutory injunction (*f*). But delay in taking proceedings is not so material whilst matters remain *in statu quo* (*g*). Moreover, it seems that mere delay is not material where an injunction is sought in aid of a legal right, and that accordingly mere lapse of time will not be a bar to the granting of an injunction at the trial, unless it would be a bar to the legal right (*h*). "Mere acquiescence," said Lord Cranworth, in *Rochdale Canal Co. v. King* (*i*), "(if by acquiescence is to be understood only the abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless indeed he continues inactive so long as to bring the case within the Statute of Limitations" (*k*).

(*e*) *Kelsey v. Dodd*, 52 L. J. Ch. H. L. p. 388. See, as to waste, 34; *Sayers v. Collyer*, 28 C. D. 103 *post*, p. 36.
(C. A.).

(*f*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 324; *Great Western Railway Co. v. Oxford, Worcester, &c., Railway Co.*, ib. 341; *Ware v. Regent's Canal Co.*, 3 D. & J. 212, 230; *Gaunt v. Fynney*, 8 Ch. 8.

(*g*) *Gale v. Abbott*, 8 Jur. N. S. 987, 989; *Archbold v. Scully*, 9

(*h*) *Fullwood v. Fullwood*, 9 Ch. D. 176; *Rowland v. Mitchell*, 75 L. T. 65; see *Hogg v. Scott*, 18 Eq. 444.

(*i*) 2 Sim. N. S. 89.

(*k*) *London, Chatham and Dover Railway Co. v. Bull*, 47 L. T. 416; *Duke of Northumberland v. Bowman*, 56 L. T. 773.

Chap. III.
Sect. 1.

Course of the
Court in dealing
with the appli-
cation.

The Court, upon the application for an *interlocutory injunction* in support of a legal right, will deal with the injunction upon the evidence before it, and will confine itself strictly to the immediate object sought, and as far as possible abstain from prejudging the question in the cause (*l*). If a fair *prima facie* case be made out, and the case is free from objections of an equitable consideration, several courses are open to the Court. Which of them will be adopted is always a matter for the discretion of the Court, but, in the absence of special circumstances, the leading principle which is the rule of the Court and limits its discretion is, that only such a restraint shall be imposed as may stop the mischief complained of, and keep the property in its actual condition until the hearing (*m*). If the case, as made out, is plain and free from doubt, the Court would, even before the Judicature Acts, in the exercise of its discretion, determine the question, and grant an injunction without putting the parties to the expense and delay of requiring the plaintiff to establish his title at law (*n*); but the case had to be very clear for the Court to adopt this course (*o*). If the defendant disputed the legal title of the plaintiff or denied the fact of its violation, the Court would seldom, however clear the case might in its opinion be, grant an injunction without putting the plaintiff to establish his legal right (*p*).

In doubtful cases where the question as to the legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right, or to order the motion to stand over until the legal right has been tried (*q*). In determining which of these two alternatives

(*l*) *Skinners' Co. v. Irish Society*, 1 M. & C. 162, 164; see 43 R. R. 176.

(*m*) *Blakemore v. Glamorganshire Railway Co.*, 1 M. & K. 154; 36 R. R. 289.

(*n*) *Bacon v. Jones*, 4 M. & C. p. 436; 48 R. R. 143; *Potts v. Levy*, 2 Drew. 272; *Gravelly v. Barnard*, 18 Eq. 523.

(*o*) *Motley v. Downman*, 3 M. & C. p. 17; 45 R. R. 195; *Eaden v. Frith*, 1 H. & M. 573.

(*p*) *Bacon v. Jones*, 4 M. & C. 436; 48 R. R. 143; *Norton v. Nicholls*, 4 K. & J. 475, 478; *Mayor of Cardiff v. Cardiff Waterworks Co.*, 4 D. & J. 596; *Harman v. Jones*, Cr. & Ph. 301.

(*q*) *Bramwell v. Halcomb*, 3 M. &

Chap. III.
Sect. 1.Balance of
convenience.

it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction (*r*), and will take care so to frame its order as not to deprive either party of the benefit he is entitled to, if in the event it turns out that the party in whose favour the order is made shall be in the wrong (*s*). In doubtful cases, if it appears, upon the balance of convenience and inconvenience, that greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it in the event of the legal right proving to be in his favour, the injunction will not be granted, but the motion will be ordered to stand over until the hearing. If, on the other hand, it appear that greater damage would arise to the plaintiff by withholding the injunction, in the event of the legal right proving to be in his favour, than to the defendant by granting the injunction, in the event of the injunction proving afterwards to have been wrongly granted, the injunction will issue (*t*). The burden lies upon the plaintiff, as the person applying for the injunction, of showing that his inconvenience exceeds that of the defendant. He must make out a case of a comparative inconvenience entitling him to the interference of the Court (*u*).

In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the Court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with (*x*).

C. 737, 739; 45 R. R. 378; *Earl of Ripon v. Hobart*, 3 M. & K. 177; 41 R. R. 40; *Imperial Gas Co. v. Broadbent*, 7 H. L. C. p. 612.

(*r*) *Bacon v. Jones*, 4 M. & C. 433, 436; 48 R. R. 143; *Hilton v. Lord Granville*, Cr. & Ph. 283, 297; *Munro v. Wivenhoe, &c., Railway Co.*, 4 D. J. & S. p. 733; *Elmhirst v. Spencer*, 2 Mac. & G. p. 50.

(*s*) *East Lancashire Railway Co. v. Hattersley*, 8 Ha. 93, 94.

(*t*) *Greenhalgh v. Manchester and Birmingham Railway Co.*, 3 M. & C. 773, 799; 45 R. R. 393; *Hilton v. Lord Granville*, Cr. & Ph. p. 297; *Plimpton v. Spiller*, 4 Ch. D. 286; *Elwes v. Payne*, 12 Ch. D. 468 (C. A.); *Mitchell v. Henry*, 15 Ch. D. p. 191; *Newson v. Pender*, 27 C. D. 43 (C. A.).

(*u*) *Child v. Douglas*, 5 D. M. & G. 741, 742.

(*x*) *Sanxter v. Foster*, Cr. & Ph.

Chap. III.
Sect. 1.

Terms imposed
on defendant as
the condition of
not granting the
injunction.

The Court may often by imposing terms on the one party, as the condition of either granting or withholding the injunction, secure the other party from damage in the event of his proving ultimately to have the legal right. If the Court feels that it can by imposing terms on the defendant secure the plaintiff, in the event of the legal right being determined in his favour, against damage from what may be done by the defendant in the meantime, and the defendant is willing to accede to the terms required by the Court, an injunction will not issue (*y*). The terms imposed on the defendant as the condition of withholding the injunction vary with the circumstances and the exigencies of the case. The defendant may be required to do such acts, or execute such works, or to remove any works, or otherwise deal with the same as the Court shall direct (*z*), or to enter into an undertaking to refrain from doing in the meantime the acts complained of by the bill (*a*), or to abide by any order the Court may make as to damages or otherwise, in the event of the legal right being determined in favour of the plaintiff (*b*). If the permission to do the act complained of involves the making of profits, the defendant will be required to keep an account of all profits made pending the trial of the right (*c*); and may also be required to pay such a sum by way of damages (in the event of the plaintiff's right being established) as the Court may direct (*d*).

302; *Rigby v. Great Western Railway Co.*, 2 Ph. 44; *East Lancashire Railway Co. v. Hattersley*, 8 Ha. p. 94.

(*y*) *Rigby v. Great Western Railway Co.*, 2 Ph. 44, 50; *Cromford and High Peak Railway Co. v. Stockport, &c., Railway Co.*, 1 D. & J. 326; *Low v. Innes*, 4 D. J. & S. 286, 293; *Elwes v. Payne*, 12 Ch. D. 470; *Mitchell v. Henry*, 15 Ch. D. 191; *Wall v. London Assets Corporation*, (1898) 2 Ch. 469; *Smith v. Baxter*, (1900) 2 Ch. 138, 148.

(*z*) *Att.-Gen. v. Manchester and Leeds Railway Co.*, 1 Ra. Ca. 436; *Waterlow v. Bacon*, 2 Eq. 514; *Barker v. North Staffordshire Rail-*

way Co., 2 DeG. & S. 55; 5 Ra. Ca. 401.

(*a*) *Clarke v. Clarke*, 13 W. R. 133.

(*b*) *Jones v. Great Western Railway Co.*, 1 Ra. Ca. 685; *McNeill v. Williams*, 11 Jur. 344; *Ford v. Gye*, 6 W. R. 235.

(*c*) *Bramwell v. Halcomb*, 3 M. & C. 737; 45 R. R. 378; *Rigby v. Great Western Railway Co.*, 2 Ph. 44; *Cory v. Farnmouth and Norwich Railway Co.*, 3 Ha. 603; *Elwes v. Payne*, 12 Ch. D. 470; *Mitchell v. Henry*, 15 Ch. D. 191.

(*d*) *Rigby v. Great Western Railway Co.*, 2 Ph. 44, 50.

Where an injunction is withheld upon the condition of the defendant entering into an undertaking as to terms, the Court may make it a part of the order that if default is made in complying with the order the injunction shall issue (*e*).

As on the one hand the Court may in doubtful cases, as a condition of withholding an injunction, require the defendant to enter into terms, so on the other hand it will, as a condition of granting an injunction, require the plaintiff to enter into an undertaking as to damages in the event of the right at law being determined in favour of the defendant, and the injunction proving to have been wrongly granted (*f*). The undertaking was formerly required only in cases where the application was *ex parte*, but the present case is to require the undertaking as well where the motion is on notice as where it is *ex parte* (*g*). Where the question at issue has reference to the payment of money (*e.g.*, where a mortgagor seeks to restrain his mortgagee from selling (*h*), or where a tenant seeks to restrain a distress (*i*)), the Court may, as a condition of granting an injunction, require the money to be paid into Court.

The Court may, on granting an injunction, put the plaintiff on an undertaking to prosecute the action with due diligence (*k*). The Court may also, upon granting or refusing an injunction, impose terms as to admissions being made at the trial (*l*). In granting an interlocutory injunction at the instance of the Attorney-General suing on behalf of the

Terms imposed on plaintiff as a condition of granting an injunction.

Undertaking as to damages not required from Crown

(*e*) *Proprietors of Northam Bridge and Roads v. London and Southampton Railway Co.*, 1 Ra. Ca. 653; *Spencer v. London and Birmingham Railway Co.*, ib. 159; *Att.-Gen. v. Eastern Counties Railway Co.*, 3 Ra. Ca. 337.

(*f*) *Chappell v. Davidson*, 8 D. M. & G. 1.

(*g*) *Smith v. Day*, 21 C. D. p. 424; *Chappell v. Davidson*, 8 D. M. & G. 1; *Tuck v. Silver*, John. 218. See, however, the case of *Ingram v. Stiff*, cited in the note to *Tuck v. Silver*, where, the defendant being

clearly guilty of fraud, the V.-C. granted an injunction without requiring the plaintiff to give an undertaking as to damages.

(*h*) *Whitworth v. Rhodes*, 20 L. J. Ch. 105.

(*i*) *Shaw v. Lord Jersey*, 4 C. P. D. 359.

(*k*) *Newson v. Pender*, 27 Ch. D. 43, 63.

(*l*) *Hilton v. Lord Granville*, Cr. & Ph. 283; *Sweet v. Cator*, 11 Sim. 572; *Dickens v. Lee*, 8 Jur. 186; *Boln v. Bogue*, 10 Jur. 420.

Chap. III.
Sect. 1.

Crown, the Court will not, as a rule, require an undertaking as to damages to be given (*m*).

Interim restraining order.

Instead of issuing the injunction in the first instance, the prohibition of the Court is often issued and conveyed in the shape merely of an interim restraining order, by which the defendant is restrained until after a particular day named, liberty being given to the plaintiff to serve notice of motion for an injunction for the day before such day (*n*).

Dismissal of action unless Court can form a favourable opinion as to the merits.

If the plaintiff has not, in the opinion of the Court, laid a sufficient foundation for his action, it will be dismissed. The Court will not order the motion to stand over or retain an action, unless it has a favourable opinion on the merits of the case (*o*). Nor will the Court, unless the circumstances of the case are such as to lead it to form an opinion as to the legality of the act complained of, or to put the case into a course of immediate investigation, allow the motion to stand over till the purpose has been so far executed as that its character may be judged of, but will refuse the motion (*p*). An injunction will not be granted on the principle that it will do no harm to the defendant, if he has not done the act complained of (*q*).

Injunction pending appeal.

The mere fact that an appeal may be pending is not a ground for refusing an injunction to restrain the violation of a legal right (*r*). Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree (*s*). The Court may, however, suspend the operation of the injunction for a given time if there is danger of irreparable mischief being done in the meantime, or if there are grounds for doubting the correctness of the decision (*t*); and the Court may, on a proper case being made

(*m*) *Att.-Gen. v. Albany Hotel Co.*, (1896) 2 Ch. 696 (C. A.); and see further, as to undertakings for damages, *post*, Chap. XXIV., s. 1.

(*n*) See *post*, Chap. XXIV., s. 1.

(*o*) *Wicks v. Hunt*, John. 372, 381; *Ware v. Regent's Canal Co.*, 3 D. & J. p. 231.

(*p*) *Haines v. Taylor*, 2 Ph. 209.

(*q*) *Coffin v. Coffin*, Jac. p. 72; 23 R. R. 1.

(*r*) *Att.-Gen. v. Bradford Canal Co.*, 2 Eq. 71; *Penn v. Bibby*, 3 Eq. 308.

(*s*) *Walford v. W.*, 3 Ch. 814.

(*t*) *Att.-Gen. v. Bradford Canal Co.*, 2 Eq. 71; *Walford v. W.*, 3 Ch. 812, 814.

out, restrain by injunction all dealings with a fund pending an appeal to the House of Lords, although the Court has decided against the title of the plaintiff and dismissed the action (*u*). The jurisdiction, however, will be exercised with care and so as not to encourage any one to present an appeal for the purpose of delay (*x*).

Chap. II
Sect. 1.

SECTION II.—PERPETUAL INJUNCTIONS—MANDATORY
INJUNCTIONS.

After the establishment of his legal right and of the fact of its violation, a man is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case (*y*). The jurisdiction is founded on the equity of relieving a man from the necessity of bringing action after action at law for every violation of a common law right, and of finally quieting the right, after a case has received such full decision as entitles a man to be protected against further trials of the right (*z*). The award of an arbitrator is for the purposes of the injunction as good as a verdict (*a*).

Sect. 2.
Perpetual
injunctions.

The fact that trifling or merely nominal damages may have been recovered at law is not *per se* a sufficient ground for refusing to grant a perpetual injunction (*b*); but it is a circumstance which the Court will take into consideration in determining whether to exercise its jurisdiction (*c*). The Court will in general have regard not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances (*d*). The consideration of the balance of convenience and inconvenience in granting or withholding the injunction

(*u*) *Polini v. Gray*, 12 Ch. D. 438; 28 W. R. 361.

(*x*) 12 C. D. 446, 447.

(*y*) *Imperial Gas Co. v. Broadbent*, 7 H. L. C. 612; and see *Shelfer v. City of London Electric Co.*, (1895) 1 Ch. 314, 315.

(*z*) *Imperial Gas Co. v. Broadbent*, *supra*; *Lowndes v. Bettie*, 33 L. J. Ch. 451.

(*a*) *Imperial Gas Co. v. Broadbent*, 7 H. L. C. 600.

(*b*) *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78, 86; 16 Beav. 638.

(*c*) *Wood v. Sutcliffe*, 2 Sim. N. S. p. 165.

(*d*) *Ib.*; *National Provincial, &c., Co. v. Prudential Assurance Co.*, 6 C. D. p. 769. But see *post*,

Chap. III.
Sect. 2.

is not neglected by the Court. If the granting the injunction would have the effect of inflicting serious damage upon the defendant without restoring or tending to restore the plaintiff to the position in which he originally stood, or doing him any real practical good (*e*); or if the mischief complained of can be properly, fully, and adequately compensated by a pecuniary sum (*f*), an injunction will not issue. If, on the other hand, the mischief complained of is of so material a nature that it cannot be adequately compensated by a pecuniary sum, and the granting an injunction will restore or tend to restore the parties to the position in which they formerly stood and have a right to stand, it is the duty of the Court to interfere by perpetual injunction, notwithstanding the serious damage caused thereby to the defendant (*g*). If a considerable time must elapse to enable the parties to comply with an injunction without being put to grievous annoyance and expense, the Court will order that the injunction do not commence until after the lapse of a certain stated period (*h*).

Acquiescence.

The principles of the Court with respect to delay and acquiescence applicable to the case of interlocutory injunctions hold also in the case of applications for perpetual injunctions. But to justify the Court in refusing to interfere at the hearing, there must be a stronger case of acquiescence than is sufficient to be a bar on the interlocutory application (*i*). A man who, possessing a full knowledge of his rights, has lain by and has by his conduct encouraged others to expend moneys in contravention of the rights for which he afterwards contends, cannot come to the Court for relief by perpetual injunction, however clear his right or whatever may be the value of the right, but must rest

Chap. X., as to cases depending upon covenant or contract.

(*e*) *Wood v. Sutcliffe*, 2 Sim. N.S. 163, 168; but see *post* as to cases depending on covenant or contract.

(*f*) *Wood v. Sutcliffe*, 2 Sim. N.S. 166, 169.

(*g*) *Wood v. Sutcliffe*, 2 Sim. N.S. 165; *Imperial Gas Co. v. Broadbent*, 7 H. L. C. 600; *Tipping v.*

St. Helen's Smelting Co., 1 Ch. 66; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287 (C. A.).

(*h*) *Att.-Gen. v. Bradford Canal Co.*, 2 Eq. 83, 84; and see *Seton*, 563, 564, 592.

(*i*) *Johnson v. Wyatt*, 2 D. J. & S. 18; *ante*, p. 18.

satisfied with such damages as a jury will give (*k*). A man may by acquiescence not only preclude himself from being able to derogate from a state of things which has been brought about by his own conduct, but may even give the adverse party a right to the interference of the Court in the event of his complaining at law (*l*). But the Court will not act upon light grounds against the legal right of the parties. It requires a clear and strong case to lead the Court to deprive a man of his right at law to prevent a particular act being done, or his right to recover damages if it be done. There must be fraud or such acquiescence as in the view of the Court would make it a fraud in him afterwards to insist upon his legal right (*m*); and it seems that *mere delay* will not disentitle a plaintiff to an injunction in aid of a legal right unless the claim to enforce the right is barred by the Statutes of Limitations (*n*).

Chap. III.
Sect. 2.

A perpetual injunction will not without consent be granted before the hearing (*o*). But an injunction may by consent be made perpetual on motion (*p*).

Perpetual injunctions not granted before the hearing without consent.

A man is not bound to apply by motion in the first instance. He may obtain a perpetual injunction at the hearing, although he has not applied for an injunction on interlocutory application (*q*); and where a mandatory injunction is sought it is not unusual to wait until the hearing before applying for the injunction (*r*).

If the act complained of involves the making of profits, the right to an account of profits is incidental to the right to an injunction. There can in general be no account if the case for

Account.

(*k*) *Dann v. Spurrier*, 7 Ves. 231, 235; 6 R. R. 119; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 88; 16 Beav. 630; *Wood v. Sutcliffe*, 2 Sim. N. S. 169; *Davies v. Sear*, 7 Eq. 427. See *Gale v. Abbott*, 8 Jur. N. S. 987.

(*l*) *Williams v. Earl of Jersey*, Cr. & Ph. 97.

(*m*) *Gerrard v. O'Reilly*, 3 Dr. & War. 433; *Bunkart v. Houghton*, 27 Beav. 431; *Hogg v. Scott*, 18 Eq. 454; *Smith v. Smith*, 20 Eq. 503; *Willmott v. Barber*, 15 Ch. D. 105; *Proctor v. Bennis*, 36 Ch. D. 740.

(*n*) *Fullwood v. F.*, 9 C. D. 176; *London, Chatham, and Dover Railway Co. v. Bull*, 47 L. T. 413, 416.

(*o*) *Day v. Snee*, 3 V. & B. 171.

(*p*) *Morrell v. Pearson*, 12 Beav. 284.

(*q*) *Bacon v. Jones*, 4 M. & C. 436; 48 R. R. 143; *Davies v. Marshall*, 1 Dr. & Sm. 560, 561; *Gale v. Abbott*, 8 Jur. N. S. 987.

(*r*) *Gale v. Abbott*, 8 Jur. N. S. 987.

Chap. III.
Sect. 2.

an injunction fails, or if at the hearing there is nothing on which an injunction can operate (*s*). The account is limited to the profits actually made and the moneys actually received by the wrongdoer. There can be no account in respect of acts unattended with profit (*t*). The account is of all profits actually made for six years prior to the bringing of the action (*u*). An account will not be granted if there be delay in bringing the action (*x*).

In consequence of the difficulty of working out a decree for an account of profits, such an account is not usually taken. A reasonable compromise is generally found to be most for the benefit of the parties (*y*). If the amount of profits for which the defendant would have to account is small, the plaintiff usually waives the account (*z*), and if the defendant submits, the suit does not proceed to the hearing, but a decretal order is made, giving effect to the agreement between the parties. The plaintiff is entitled to discovery for the purposes of the account.

Costs of action.

Where a plaintiff comes to enforce a legal right and there has been no neglect or misconduct on his part, the Court will not take away his right to costs. There may be misconduct of many sorts: there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings (*b*), or other misconduct which will induce the Court to refuse costs, but where there is nothing of the kind, the rule is well settled (*c*).

(*s*) *Baily v. Taylor*, 1 Russ. & M. 73; 32 R. R. 146; *Price's Candle Co. v. Bauwen's Candle Co.*, 4 K. & J. 727.

(*t*) *Colburn v. Simms*, 2 Ha. 560; *Powell v. Aikin*, 4 K. & J. 343, 351; but see *Mallock v. Blackwood*, (1898) 1 Ch. 58.

(*u*) *Crossley v. Derby Gas Light Co.*, 1 Webs. 119, 120; *Dean v. Thwaite*, 21 Beav. 623.

(*x*) *Crossley v. Derby Gas Light Co.*, 4 L. J. Ch. 25; 1 Webs. 119, 120; 41 R. R. 198; *Parrott v. Palmer*, 3 M. & K. 643; 41 R. R. 149; *Harrison v. Taylor*, 11 Jur.

N. S. 408.

(*y*) *Crossley v. Derby Gas Light Co.*, 3 M. & C. 428, 436.

(*z*) See *Fradella v. Weller*, 2 R. & M. 247; 34 R. R. 81.

(*b*) See *Walter v. Steinkopff*, (1892) 3 Ch. 489.

(*c*) *Cooper v. Whittingham*, 15 Ch. D. 504, per Jessel, M.R.; *Upman v. Forester*, 24 C. D. 231. But see Ord. LXV. r. 1; and see the Judicature Act, 1890, s. 5; and see, also, *Walter v. Steinkopff*, (1892) 3 Ch. 489, 500.

In a recent case (*d*) the plaintiffs brought an action against the defendant, who had innocently purchased in the market (at the price of 17s. 6d.) 500 cigarettes which infringed the plaintiffs' trade mark. The Court granted an injunction but refused to allow the plaintiffs their costs.

Chap. III.
Sect. 2.

Actions for an injunction to restrain the violation of a legal right do not usually go to the hearing. If the defendant offers to submit to an injunction with costs, and to give the plaintiff all the other relief to which he may be under the circumstances of the case entitled, and no question remains open to be decided between the parties and no account is sought or the account is waived, and the plaintiff nevertheless proceeds to trial, the Court, though it may give the plaintiff the decree, will not give him the costs of the subsequent prosecution of the action up to the trial (*e*). The tender must include the costs of the action up to the time when the tender is made (*f*). If the defendant does not offer to submit to the injunction and pay all the costs up to that time (*g*), or if, although he offers to submit to the injunction, he refuses to pay the costs, or to give the plaintiff any of the other relief to which he is entitled, the plaintiff is entitled to bring the action to trial and will have the costs of the action (*h*).

Injunction
actions do not
usually proceed
to trial.

A plaintiff who obtains on an interlocutory application the relief which he seeks, should make an application to the defendant to have the costs disposed of on motion. If he does not do so, or if, on the application of the defendant to have the

(*d*) *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630. Beav. 578; *Nunn v. Albuquerque*, 34 Beav. 595; *Jenkins v. Hope*, (1896) 1 Ch. 278.

(*e*) *Millington v. Fox*, 3 M. & C. 352; 45 R. R. 271; *Colburn v. Simms*, 2 Ha. 561; *Chappell v. Davidson*, 2 K. & J. 123; *Nunn v. Albuquerque*, 34 Beav. 595; *M'Andrew v. Bassett*, 4 D. J. & S. 386; *Sonnenschein v. Barnard*, 57 L. T. 713; *Jenkins v. Hope*, (1896) 1 Ch. 278. (*g*) *Upman v. Forester*, 24 Ch. D. 231; *Witman v. Oppenheim*, 27 Ch. D. 260; *Sonnenschein v. Barnard*, 57 L. T. 713.

(*h*) *Fradella v. Weller*, 2 R. & M. 247; 34 R. R. 81; *Geary v. Norton*, 1 De G. & S. 12; *Chappell v. Davidson*, 2 K. & J. 123; *Burgess v. Hill*, 26 Beav. 244; *M'Andrew v. Bassett*, 4 D. J. & S. 380; *Sonnenschein v. Barnard*, 57 L. T. 713.

Chap. III.
Sect. 2.

costs disposed of on motion, he refuses to give his consent, and no question remains open to be decided between the parties, he will not be entitled to have the costs occasioned by going on to trial. The question of costs cannot be determined in this way without the consent of the parties, but the party who refuses to consent must justify his refusal, and must satisfy the Court that he is justified in bringing the action on to trial (*i*).

If both parties are in the wrong, the one claiming more than he is entitled to claim and the other offering less than he is bound to offer (*k*), or the one succeeding as to part of his claim and failing as to another part (*l*), no costs will be given to either side, or the costs as to which one party has failed will be taxed and set off against those in which he has succeeded, and the balance of such costs only will be paid to the party entitled to such costs (*m*).

If the defendant has been to blame in the matter, the dismissal of the action will be without costs (*n*).

A *bonâ fide* offer from the defendant before action to give the plaintiff all the relief to which he is entitled and which he ultimately obtains by the action, may be a reason for depriving the plaintiff of the costs (*o*).

If the costs of the action have been increased by an allegation in the statement of claim which is untrue, such increased costs will have to be paid by the plaintiff, although his case may be substantially established (*p*). But a wrongdoer cannot

(*i*) *Morgan v. Great Eastern Railway Co.*, 1 H. & M. 78; *Wilde v. Wilde*, 4 D. F. & J. 348; *Sonnen-schein v. Barnard*, 57 L. T. 712.

(*k*) *Moet v. Couston*, 33 Beav. 578; *Wood v. Saunders*, 10 Ch. 586.

(*l*) *Russell v. Watts*, 25 Ch. D. p. 577; *Moore v. Bennett*, 1 Pat. Ca. Rep. 130.

(*m*) *Bourke v. Alexandra Hotel Co.*, 25 W. R. 782; *Nordenfelt v. Gardner*, 1 Pat. Ca. Rep. 65; *Sellors v. Matlock Board of Health*, 14 Q. B. D. 929; see *Cracknall v. Janson*, 11 Ch. D. 23; *Knight v.*

Pursell, 49 L. J. Ch. 120; *Jenkins v. Jackson*, (1891) 1 Ch. 89 (C. A.). See Ord. LXV. r. 27, sub-rule 21.

(*n*) *Wylam v. Clarke*, W. N. (1876) 68; *Harrison v. Goode*, 11 Eq. 351; *Borthwick v. Evening Post*, 37 Ch. D. 460.

(*o*) *Millington v. Fox*, 3 M. & C. 338; 45 R. R. 271; *Colburn v. Simms*, 2 Ha. 543; *Snuggs v. Seyd*, W. N. (1894) 95; *Jenkins v. Hope*, (1896) 1 Ch. 278.

(*p*) *Pierce v. Franks*, 15 L. J. Ch. 122; *Rose v. Loftus*, 47 L. J. Ch. 576.

be heard to complain that in proceedings hurriedly taken to stop the wrong, the plaintiff has not accurately stated his title; in such a case the defendant will not be relieved from the payment of the extra costs occasioned by the plaintiff's mistake as to his title (*q*).

Costs will be ordered to be taxed on the higher scale where there are special grounds (*r*).

Chap. III.
Sect. 2.

Mandatory Injunctions.

Although the Court of Chancery would not direct the performance of a positive act tending to alter the existing state of things (such as the removal of a work already executed), nevertheless, by framing its order in an indirect form, it would compel a defendant to restore things to their former condition, and so effectuate the same result as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a *mandatory injunction*. The jurisdiction was formerly questioned (*s*), but its existence must be admitted as beyond all doubt (*t*); and it is now settled that the Court can frame the injunction in a positive form (*u*). But the jurisdiction to grant a mandatory injunction is exercised with caution, and is strictly confined to cases where the remedy by damages is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case.

The Court will not interfere by way of mandatory injunction without taking into consideration the comparative convenience and inconvenience which the granting or withholding the injunction would cause to the parties. If the injury done is

(*q*) *Att.-Gen. v. Tomline*, 5 C. D. 730.

(*r*) Ord. LXV. r. 9; see *Hudson v. Ogerby*, W. N. (1884) 83; 32 W. R. 556; *Holland v. Worley*, W. N. (1884) 90; *Turton v. T.*, 42 C. D. 128, 149 (C. A.); *American Braided Wire Co. v. Thomson*, 44 C. D. 274, 296 (C. A.); *Rivington v. Garden*, (1901) 1 Ch. 61.

(*s*) See *Lane v. Newdigate*, 10 Ves. 192; 7 R. R. 381; and *Blakemore v. Glamorganshire Railway Co.*, 1 M. & K. p. 184; 36 R. R. 289.

(*t*) *Hervey v. Smith*, 1 K. & J. 392; *Smith v. Smith*, 20 Eq. 504; *Herman Loog v. Bean*, 26 Ch. D. 314.

(*u*) *Jackson v. Normanby Brick Co.*, (1899) 1 Ch. 438 (C. A.).

Chap. III.
Sect. 2.

capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the Court will not interpose by way of mandatory injunction, but will direct an inquiry in order to ascertain the measure of damages that has been actually sustained (*x*). If, on the other hand, the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case, or if the act complained of is in breach of an express stipulation, the injunction will issue, notwithstanding the amount of inconvenience to the other party (*y*), and though the expense thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it (*z*).

If the act complained of is continued or carried on after clear and distinct notice that it is objected to, or if during the progress of the action an undertaking has been given to pull down the building if so ordered at the trial, and the injury done is of a serious nature, the jurisdiction will be exercised more freely than in cases where complaint is not made until after it is completed (*a*); but the mere fact that the act complained of has been continued or carried on after notice of objection is not of itself a sufficient ground for the exercise of the jurisdiction, if the injury done can be properly compensated by a pecuniary sum (*b*).

(*x*) *Isenberg v. East India House, &c., Co.*, 3 D. J. & S. 263; *City of London Brewery Co. v. Tennant*, 9 Ch. 218; *Lady Stanley v. Lord Shrewsbury*, 19 Eq. 620; *National Provincial, &c., &c., Co. v. Prudential Assurance Co.*, 6 Ch. D. 769; *Allen v. Seckham*, 11 Ch. D. 791.

(*y*) *Isenberg v. East India House, &c., Co.*, 3 D. J. & S. 263; *Durell v. Pritchard*, 1 Ch. 244; *Kelk v. Pearson*, 6 Ch. 813; *Goodson v. Richardson*, 9 Ch. 221; *Krehl v. Burrell*, 7 Ch. D. 551; 11 Ch. D. 146; *Mucmanus v. Cooke*, 35 Ch. D. 687; *Martin v. Price*, (1894) 1 Ch.

276 (C. A.); *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217 (C. A.); *Home and Colonial Stores v. Colls*, (1902) 1 Ch. 302 (C. A.).

(*z*) *Woodhouse v. Newry Navigation Co.*, (1898) 1 Ir. R. 161.

(*a*) *Jacomb v. Knight*, 3 D. J. & S. 538; *Hepburn v. Lordan*, 2 H. & M. 345; *Grand Junction Canal Co. v. Shugar*, 6 Ch. 489; *Krehl v. Burrell*, 7 Ch. D. 551; 11 Ch. D. 146; *Smith v. Day*, 13 Ch. D. 652; *Greenwood v. Hornsey*, 33 Ch. D. 471.

(*b*) *Isenberg v. East India House, &c., Co.*, 3 D. J. & S. 263; *Senior v. Pawson*, 3 Eq. 335.

A benefit resulting to the plaintiff through the act of the defendant, though it is no compensation for injury, may be taken into account in deciding whether an injunction or damages shall be granted (c). There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action (d). On an application for a mandatory injunction the Court will have regard to the character of the building sought to be removed, and if the building is one which can be removed without any great hardship being imposed on the defendant, may grant the mandatory order, though the building was erected and completed before action brought and without any complaint on the part of the plaintiff (e). But the Court will seldom interfere to pull down a building which has been erected without complaint (f).

A man who comes to the Court for a mandatory injunction should use due diligence in making the application. Mere delay will not be fatal to the application if no mischief is caused thereby to the defendant, and the delay does not exceed a reasonable period (g); but the right to a mandatory injunction is gone if there has been unreasonable delay, and mischief would be caused thereby to the defendant (h).

If a proper case be made out, a mandatory injunction may be granted against an agent (i).

(c) *National, &c., Plate Glass Assurance Co. v. Prudential Assurance Co.*, 6 C. D. p. 769.

(d) *Durell v. Pritchard*, 1 Ch. 244; *Kelk v. Pearson*, 6 Ch. 813; *Goodson v. Richardson*, 9 Ch. 221; *Smith v. Smith*, 20 Eq. 504; *Morris v. Grant*, 24 W. R. 55; *Lawrence v. Horton*, 38 W. R. 555; *Shiel v. Godfrey*, W. N. (1893) 115.

(e) *Baxter v. Bower*, 44 L. J. Ch. 625.

(f) *Gaskin v. Balls*, 13 C. D. 329; *Curriers' Co. v. Corbett*, 4 D. J. & S. 764. As to ordering

buildings to be pulled down by a defendant who has erected them after notice of an appeal from a judgment in his favour, see *Home and Colonial Stores v. Colls*, (1902) 1 Ch. 302, 313 (C. A.).

(g) *Gale v. Abbott*, 8 Jur. N. S. 987; *Woodhouse v. Newry Navigation Co.*, (1898) 1 Ir. R. 161.

(h) *Senior v. Pawson*, 3 Eq. 335; *Gaunt v. Fynney*, 8 Ch. 14; *Smith v. Smith*, 20 Eq. 500.

(i) *Cohen v. Poland*, W. N. (1887) 159.

Chap. III.
Sect. 2.

Mandatory injunction whether granted before hearing.

A mandatory injunction is seldom granted before the hearing (*k*), but where the case is clear and free from doubt it may be had upon interlocutory application (*l*); especially if the act required to be done involves no serious outlay, nor any considerable alteration in the existing state of things (*m*).

Where a defendant on being served with notice of motion for an injunction hurried on his buildings, a mandatory injunction was granted on an interlocutory application (*n*). So also, where a defendant, knowing a writ for an injunction against the erection of certain buildings had been issued against him, evaded service and continued the works, a mandatory injunction was granted on interlocutory application in respect of so much of the building as had been erected between the issue and service of the writ (*o*).

Suspension of injunctions.

On granting a mandatory injunction, the Court may order that its operation shall be suspended until after a certain period (*p*).

(*k*) *Gale v. Abbott*, 8 Jur. N. S. 987; *Johnston v. Courts of Justice Chambers*, W. N. (1883) 5.

(*l*) See *Allport v. The Securities Co., Ltd.*, 72 L. T. 533.

(*m*) *Hervey v. Smith*, 1 K. & J. 389, 392; *Att.-Gen. v. Met. Board of Works*, 1 H. & M. 312.

(*n*) *Daniell v. Ferguson*, (1891) 2 Ch. 27 (C. A.).

(*o*) *Von Joel v. Hornsey*, (1895) 2 Ch. 774.

(*p*) *Smith v. Smith*, 20 Eq. 500, 505; *Shiel v. Godfrey*, W. N. (1893) 115; 1 Set. 563, 564, 592.

CHAPTER IV.

INJUNCTIONS AGAINST WASTE.

SECTION I.—PRINCIPLES ON WHICH THE COURT ACTS IN RESTRAINING WASTE.

THE principles on which the Court acts in restraining waste by injunction are the same as those upon which it proceeds in other cases where its interposition is sought for the protection of legal rights (*a*). The jurisdiction is not, however, limited to cases where an action at law can be maintained, but extends to cases where, in consequence of the infirmity of legal process, there is neither a right nor a remedy at law, but only what the law in principle acknowledges to be a wrong (*b*). Thus, as early as the reign of King Richard the Second, an injunction was granted at the suit of a remainderman to stay waste by a tenant for life or for years, although the existence of an intermediate life estate formed a temporary impediment to an action at law (*c*).

Chap. IV.
Sect. 1.

Injunctions
restraining
waste.

It is not necessary for a man to wait until a serious act of waste has been committed, before applying to the Court for its interference by injunction (*h*). But the Court will not interfere where the waste is trivial and of small extent (*i*), or where

If waste be of a
trivial nature
the Court will
not interfere.

(*a*) *Ante*, p. 12 *et seq.*

(*b*) 3 D. F. & J. 55, 254, *per* Turner, L.J.; *Robinson v. Litton*, 3 Atk. p. 210; *Farrant v. Lovell*, *ib.* 723.

(*c*) *Moore*, 554; *Roswell's case*, 1 Roll. Ab. 377, pl. 13; *Farrant v. Lovell*, 3 Atk. 723.

(*h*) *Gibson v. Smith*, 2 Atk. 182;

Coffin v. Coffin, Jac. 71; 23 R. R. 1.

(*i*) *Brace v. Taylor*, 2 Atk. 253;

Barry v. Barry, 1 J. & W. 653;

Doran v. Carroll, 11 Ir. Ch. 383;

Grand Cunal Co. v. McNamee, 29

L. R. Ir. 131; and see 3 App. Ca.

p. 733, and 20 Eq. p. 540.

Chap. IV.
Sect. 1.

the person against whom relief is sought has stopped committing waste since the bringing of the action (*k*). If, however, an intention to commit further waste can be shown, the Court will interfere, though the first acts of waste may have been of a trivial nature (*l*); but where waste of one kind has been done or threatened, the injunction will not be extended to waste of another kind (*m*). If one act of waste be established as well in equitable as in legal waste, the Court will restrain the equitable waste generally (*n*).

Prospective or
threatened
damage.

The Court has jurisdiction, if a fair case of prospective injury can be made out, to interfere before waste has been actually committed. If an intention to commit waste can be shown to exist, or if a man insists on his right or threatens to commit waste, there is a foundation for the exercise of the jurisdiction (*p*).

The words "on pain of forfeiture" after a prohibition against the commission of waste does not take away the rights and remedies which arise from the prohibition itself, but will be regarded as having been inserted merely as a more effectual means of enforcing the obligation (*r*).

Delay.

A man who comes to the Court for an injunction (*s*) against waste should use due diligence in making the application. Delay, however, is not so prejudicial to the plaintiff in cases of waste as in other applications for injunctions. In some cases indeed delay is not material. A man, for instance, who has been permitted to cut down half of the trees upon the land of

(*k*) *Barry v. Barry*, 1 J. & W. 653. Comp. Anon., 3 Atk. 485.

(*l*) *Coffin v. Coffin*, Jac. 71; 23 R. R. 1; *Barry v. Barry*, 1 J. & W. 653; *Doran v. Carroll*, 11 Ir. Ch. 383. As to when the Court will infer an intention to repeat the act complained of, see *Phillips v. Thomas*, 62 L. T. 793.

(*m*) *Coffin v. Coffin*, Jac. 72; 23 R. R. 1.

(*n*) *Coffin v. Coffin*, 6 Madd. 17.

(*p*) *Gibson v. Smith*, 2 Atk. 182; *Coffin v. Coffin*, Jac. 71; 23 R. R.

1; *Barry v. Barry*, 1 J. & W. 653; *Campbell v. Allgood*, 17 Beav. 628; and see the Judicature Act, 1873, s. 25, sub-s. (8), as to granting injunctions in cases of "apprehended waste"; and see *ante*, p. 13.

(*r*) *Blake v. Peters*, 1 D. J. & S. 345.

(*s*) *Barry v. Barry*, 1 J. & W. 651. See *Bagot v. Bagot*, 32 Beav. 509. As to cases where an account, and not an injunction, is sought, see *post*, p. 78.

another, can acquire no title from the negligence of the owner to cut down the remaining half (*t*). Nor can tenants who have been in the habit of cutting turf or working quarries for many years acquire a title as against their landlord to continue to do so (*u*). Nor is a man who buys land used by tenants for making bricks, or who purchases land with notice that the land was being converted into a burying-ground, precluded from complaining of waste committed after the purchase (*x*). The case however is different if the tenant for life or lessee has been encouraged by the *acquiescence* of the reversioner or lessor to expend monies upon the property upon the faith and understanding that no obstacle will be afterwards thrown in the way of their enjoyment (*y*). In the case of mines the utmost promptitude in making the application is requisite (*z*).

SECTION II.—LEGAL WASTE.

WASTE is a substantial injury to the inheritance done by one having a limited estate either of freehold or for years during the continuance of his estate (*a*). The essential character of waste is, that the party committing it is in rightful possession, and that there is a privity of title between the parties (*b*).

The consequences of waste do not attach unless substantial damage is done to the inheritance (*c*), which may be either—

- | | |
|--|---|
| <p>(<i>t</i>) <i>Att.-Gen. v. Eastlake</i>, 11 Ha. 228, <i>per</i> Lord Hatherley.</p> <p>(<i>u</i>) <i>Lord Courtown v. Ward</i>, 1 Sch. & Lef. 8; <i>Elias v. Griffith</i>, 8 Ch. D. 525.</p> <p>(<i>x</i>) <i>Cregan v. Cullen</i>, 16 Ir. Ch. 339.</p> <p>(<i>y</i>) <i>Barry v. Barry</i>, 1 J. & W. 651. See <i>ante</i>, pp. 16—19.</p> <p>(<i>z</i>) <i>Hilton v. Lord Granville</i>, Cr. & Ph. 283; <i>Parrott v. Palmer</i>, 3 M. & K. 635; <i>Clegg v. Edmondson</i>, 8</p> | <p>D. M. & G. 808.</p> <p>(<i>a</i>) Co. Litt. 53 a; 1 Cr. Dig. 115; and see <i>West Ham Charity Board v. East London Waterworks Co.</i>, (1900) 1 Ch. p. 635.</p> <p>(<i>b</i>) <i>Davenport v. Davenport</i>, 7 Ha. p. 222; <i>Lowndes v. Bettle</i>, 33 L. J. Ch. 451, 454.</p> <p>(<i>c</i>) <i>Meux v. Cobley</i>, (1892) 2 Ch. 253; <i>West Ham Charity Board v. East London Waterworks Co.</i>, (1900) 1 Ch. p. 635.</p> |
|--|---|

Chap. IV.
Sect. 2.

Meliorating
waste.

Waste either
voluntary or
permissive

Waste at com-
mon law punish-
able only in
certain cases.

1st, by diminishing the value of the estate; 2ndly, by increasing the burdens upon it; or 3rdly, by impairing the evidence of title (*d*). An act which increases the value of an estate may nevertheless be waste if it impairs the evidence of title or increases the burdens on the property. The owner of the inheritance has a right (subject to certain statutory modifications (*e*)) to require that the nature and character of the property shall not be changed by the owner of the limited estate (*f*). The mere fact that the evidence of title may be impaired by the alteration renders it waste. Waste which increases the value of property is called meliorating waste (*g*).

Waste is either voluntary or permissive (*h*). Voluntary waste consists in the commission of acts which the owner of the limited estate has no authority to do, such as cutting timber, pulling down buildings, opening mines, and the like. Permissive waste arises from the omission of acts which it is his duty to do, as, for example, permitting buildings to go to decay by neglecting to repair them (*i*).

At common law waste was punishable only in the case of tenant in dower, tenant by the courtesy, and guardian. These estates being the creation of law, the law annexed to them the condition that waste should be neither done nor permitted. A tenant for life or for years was not at common law liable for waste in the absence of an express stipulation to that effect in the instrument by which his estate was created. An estate for life being not the creation of the law, but of the parties to the instrument, the law would not imply a condition against waste in cases where no provision to that effect was made (*k*).

(*d*) *Doe v. Earl of Burlington*, 5 B. & Ad. 507, 517; 39 R. R. 549; *Huntley v. Russell*, 13 Q. B. 572, 588; *Jones v. Chappell*, 20 Eq. 539; *West Ham Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. 624, 636.

(*e*) See *post*, pp. 78, 80.

(*f*) *West Ham Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. 624.

(*g*) 2 Wms. Saund. 259; *Duke of*

Leeds v. Amherst, 2 Ph. 123; *Copinger v. Gubbins*, 3 J. & L. 417; *Doherty v. Allman*, 3 App. Cas. 729. See *Meux v. Cobley*, (1892) 2 Ch. 253.

(*h*) But as to whether there is any liability for permissive waste, see *post*, p. 51.

(*i*) Co. Litt. 53 a; *White v. M'Cann*, 1 Ir. C. L. 205.

(*k*) 2 Inst. 145, 299; *Green v. Cole*, 2 Wms. Saund. 252.

This defect in the law was remedied by the Statutes of Marlbridge, 52 Hen. 3, c. 23, and Gloucester, 6 Edw. 1, c. 5, which enabled the writ of waste which lay at common law to be issued against tenants for life and tenants for years.

Chap. IV.
Sect. 2.

Timber trees are parcel of the inheritance. A tenant for life or years, or other owner of a limited estate, has only a right to their shade and fruit during the continuance of his estate (*l*). It is waste if he cuts them down (*m*), or does any act to impair their value or cause them to decay, as if he lops or tops them (*n*). The cutting of timber which is overripe or in a state of decay is waste (*o*). Even if a lease be of land, trees, &c., expressly mentioning the trees, the lessee has no right to cut them (*p*). Waste in trees.

Timber trees are such as are useful for the purpose of building. Ash, oak, and elm, of the age of twenty years and upwards, are timber in all places (*q*), and by the custom of different counties, other trees, such as birch, beech, walnut, whitethorn, willow, blackthorn, hornbeam, &c., are timber (*r*). What trees are timber.

The cutting of many sorts of trees, which are not otherwise timber, as hornbeams, hazels, willows, sallows, &c., &c., may, from the situation in which they are placed, be considered waste, as if they support a bank, or grow within the site of or shelter a house, or stand in a field, or are used as shelter by cattle (*s*). Waste—when committed by cutting down trees which are not timber.

It is not waste to cut down trees which are not timber either by law or custom, or from the situation in which they are

(*l*) 4 Co. Rep. 62 b; 11 Co. Rep. 50 a; 1 Roll. Ab. 181.

(*m*) Co. Litt. 53 a.

(*n*) *Ib*.

(*o*) *Perrott v. Perrott*, 3 Atk. 93. See, however, 40 & 41 Vict. c. 18, s. 16; and 45 & 46 Vict. c. 38, s. 35.

(*p*) *Lifford's case*, 11 Co. Rep. 46 b, Dyer, 374, pl. 18, Shep. Touch. 95; *Herring v. Dean and Chapter of St. Paul's*, 3 Sw. 512; 19 R. R. 259.

(*q*) Co. Litt. 53 a; 2 Roll. Ab. 814; Dyer, 65 a.

(*r*) Co. Litt. 53 a; *Duke of Chandos v. Talbot*, 2 P. Wms. 606; *Honywood v. Honywood*, 18 Eq. 309; *Dashwood v. Magniac*, (1891) 3 Ch. 306 (C. A.); Cruise, Dig. tit. 3, ch. 2, ss. 5—7; Craig on Trees, 11.

(*s*) Co. Litt. 53 a; *Phillipps v. Smith*, 14 M. & W. 593; Craig on Trees, 12.

Chap. IV.
Sect. 2.

placed, unless some special prejudice arises thereby to the inheritance (t). Nor is the cutting down oak, ash, and elm trees under twenty years of age waste, provided they are cut down for the purpose of allowing the proper development and growth of other timber in the same wood or plantation (u). But the cutting down of trees which being under twenty years of age are not timber, but which would be timber if they were over twenty years of age, is waste, provided it be not done for the purpose of improving the other trees (x).

Exception in the
case of timber
estates.

The general rules with respect to waste in timber are subject to exceptions in the case of what are called timber estates (y), that is to say, "estates the trees on which, though timber, may, by virtue of a local usage, be cut periodically when grown in woods, with a view to secure a succession of timber and to preserve such woods" (z).

Underwood and
coppice.

It is not waste to cut hedges, bushes, and underwood, and even oaks and ashes which have been usually cut as underwood, provided the cutting be done in a reasonable and husbandlike manner, and so as not to eradicate or destroy the germens or prevent their future growth (a). Nor is it waste to cut timber where the underwood is the most important part of the produce, and the cutting of timber is necessary for its growth (b).

Dead trees.

It seems that it is not waste to fell trees which are completely dead and bear neither fruit nor leaves (c),

(t) Co. Litt. 53 a; *Barrett v. Barrett*, Het. 36; *Phillipps v. Smith*, 14 M. & W. 589.

(u) *Pidgeley v. Rawling*, 2 Coll. 275; *Earl Cowley v. Wellesley*, 1 Eq. 656; *Honywood v. Honnywood*, 18 Eq. 309.

(x) *Honywood v. Honnywood*, 18 Eq. 310. See *Lowndes v. Norton*, W. N. (1876) 221.

(y) *Ferrand v. Wilson*, 4 Ha. 375; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & S. 75; *Honywood v. Honnywood*, 18 Eq. 310.

(z) *Dashwood v. Magniac*, (1891) 3 Ch. p. 357.

(a) Co. Litt. 53 a; *Brydges v. Stephens*, 6 Madd. 279; 23 R. R. 217; *Humphreys v. Harrison*, 1 J. & W. 581; 21 R. R. 238; *Pidgeley v. Rawling*, 2 Coll. 275; *Phillipps v. Smith*, 14 M. & W. 589; *Earl Cowley v. Wellesley*, 1 Eq. 656.

(b) *Knight v. Duplessis*, 2 Ves. 361.

(c) Co. Litt. 53 a; 2 Roll. Ab. 814; but see *Re Llewellyn*, 37 C. D. 317, 324.

and have not sufficient timber in them for buildings or posts (*d*).

Chap. 1V.
Sect. 2.

Trees which have been excepted out of a demise may not be cut down by the tenant (*e*). An exception of trees generally applies only to timber trees, and not to apple or other fruit trees, or the like (*f*). Where the exception was of timber and other trees, but not the annual fruit thereof, it was held that apple trees were not within it, because it was to be construed strictly against the lessor (*g*).

Exception of
trees.

A copyholder, being considered in law to be a tenant at will, has in general the same possessory interest in the trees as he has in the land. Apart from special custom, he cannot cut down trees or do any other act to the injury of the freehold except with the lord's concurrence (*h*). But by custom a copyholder of inheritance, or a copyholder for life, with power to renew and nominate his successor, may have the right to fell timber upon his tenement and retain the same for his own use (*i*). The lord cannot, any more than the copyholder, cut down trees upon the tenement of a copyholder, without a custom authorising him to do so (*k*).

Rights of copy-
holder in timber.

"As regards trees in an ordinary copyhold," said Jessel, M.R., in *Eardley v. Lord Granville* (*l*), "the property remains in the lord, but in the absence of custom, he cannot cut them down. The possession is in the copyholder; the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the

(*d*) *Manwood's case*, Moor. 101, Dyer, 332, Gibbon on Dilap. 215.

842; 29 R. R. 431. See further, Craig on Trees, 15.

(*e*) *Goodright v. Vivian*, 8 East, 190. See *Legh v. Heald*, 1 B. & A. 622; 35 R. R. 402; *Doe dem. Douglas v. Lock*, 2 A. & E. 705; 41 R. R. 496; *Doe v. Price*, 8 C. B. 894.

(*h*) Scriven on Cop. 289; Elton, 232; *Eardley v. Lord Granville*, 3 Ch. D. 832.

(*f*) *Wyndham v. Way*, 4 Taunt. 316; 13 R. R. 607.

(*i*) *Blewett v. Jenkins*, 12 C. B. N. S. 16. See Scriv. on Cop. 289.

(*k*) *Whitechurch v. Holdworthy*, 19 Ves. 212; 16 R. R. 481.

(*g*) *Bullen v. Denning*, 5 B. & C.

(*l*) 3 C. D. 832.

Chap. IV.
Sect. 2.

question of forfeiture, the lord can bring an action against the copyholder."

Estovers.

A tenant for life or for years has the right to cut timber by way of estovers for the necessary repairs of the house and principal buildings, the fences, gates, and agricultural implements. If there is no underwood, he may also cut, or at least lop, timber for the purpose of firewood (*m*). He has this privilege of common right, but the estovers must be reasonable (*n*). The right to estovers attaches as a right to the particular estate on which they have been taken. Estovers cut on one estate cannot be used on another (*o*). A tenant for life or for years may cut timber to repair houses which he is not strictly bound to repair (*p*), but he may not cut timber to make new fences or to build new houses, or to repair houses which he has wasted or suffered to be wasted (*q*). Nor can he cut timber for the purpose of working mines (*r*), or burning bricks (*s*), or generally for agricultural purposes (*t*). The cutting of timber which is not fit for repairs (*u*), or the cutting of more timber than is necessary for repairs (*x*), is waste. But if timber be cut down *bonâ fide* for the purpose of being used in repairs, the tenant is justified, though he may have over-calculated the quantity required (*y*). The timber cut must be applied specifically towards the actual repairs for which it has been cut. It cannot be sold for the purpose of raising money for the purchase of other timber (*z*), or for the purpose of

(*m*) *Manwood's case*, Moor. 101; 2 Roll. Ab. 823; Co. Litt. 41 b; Vin. Ab. Waste; Com. Dig. Waste; Craig on Trees, 4. See *Howley v. Jebb*, 8 Ir. C. L. 435. See, as to covenant by lessee to repair, "having or taking sufficient house-bote, and without committing waste," *Dean and Chapter of Bristol v. Jones*, 1 El. & El. 484.

(*n*) Co. Litt. 41 b.

(*o*) *Lee v. Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. Jr. 78; *Nash v. Earl of Derby*, 2 Vern. 537.

(*p*) Co. Litt. 54 b. See *Sarles*

v. Sarles, 3 Sandf. Ch. (Amer.) 601;

(*q*) Co. Litt. 53 b; 2 Roll. Ab. 815; *Darcy v. Askwith*, Hob. 234.

(*r*) *Darcy v. Askwith*, ib.; Hutt. 19.

(*s*) *Livingston v. Reynolds*, 26 Wend. (Amer.) 115.

(*t*) *Jackson v. Brownson*, 7 Johns. (Amer.) 228.

(*u*) *Simmons v. Norton*, 7 Bing. 648; 33 R. R. 588.

(*x*) Co. Litt. 53 b.

(*y*) *East v. Harding*, Cro. Eliz. 498; *Doe v. Wilson*, 11 East, 56.

(*z*) Co. Litt. 53 b; *Lewis Bowle's case*, 11 Co. Rep. 82 a; *Simmons v. Norton*, 7 Bing. 648; 33 R. R. 588.

defraying the expenses of past or contemplated repairs (*a*); nor can it be exchanged for other timber better adapted for the repairs in question (*b*). It is waste even if the same wood which has been sold be bought back again (*c*). Chap. IV.
Sect. 2.

Timber may not be cut for the purpose of firewood as long as there is any dry or decayed wood or underwood on the land (*d*). The right to firebote is limited to the taking of sufficient wood for the principal dwelling-house or mansion on the estate, and does not extend to firewood for farmers or labourers; nor could a custom to that effect be supported (*e*). Estovers.

A copyholder is entitled to estovers by custom, and it would appear that he is entitled to them of common right even without a custom (*f*).

The committee of a lunatic's estate may cut timber for repairs as a prudent owner would do (*g*).

The cutting of fruit trees growing in a garden or orchard is waste, unless they have been torn up by the wind (*h*). But it is not waste to cut fruit trees which do not grow in a garden or orchard, but grow scatteringly on divers places of the land (*i*). The ploughing up a strawberry-bed before it is exhausted is waste (*k*). Waste in gardens
and orchards.

It is waste if the tenant of a dove-house, warren, park, fish-pond, or the like take so many of the animals that the perpetuity of succession is destroyed (*l*); or suffer the pale of the park to decay so that the deer escape, or permit the banks Waste in parks,
ponds, warrens,
&c.

(*a*) *Gorges v. Stanfield*, Cro. Eliz. 393; *Lee v. Alston*, 1 Bro. C. C. 194, 3 Bro. C. C. 37; *Gower v. Eyre*, Coop. 156.

(*b*) *Att.-Gen. v. Stawell*, 2 Anst. 601.

(*c*) Co. Litt. 53 b.

(*d*) 2 Roll. Ab. 820, pl. 9; Co. Litt. 53 b; *Cruise*, Dig. 80; *Cole v. Peyson*, 1 Ch. Ca. 106; *Jackson v. Brownson*, 7 Johns. (Amer.) 228.

(*e*) *Sarles v. Sarles*, 3 Sand. Ch. (Amer.) 601.

(*f*) *Heydon's case*, 13 Co. Rep. 67; *Scriven on Cop.* 291 *et seq.*

(*g*) *Ex parte Ludlow*, 2 Atk. 407; Pope, 2nd ed. 162.

(*h*) Co. Litt. 53 a; *Littler v. Thompson*, 2 Beav. 129.

(*i*) Bro. Ab. Waste, pl. 143.

(*k*) *Watherell v. Howells*, 1 Camp. 227.

(*l*) Co. Litt. 53 b; Hob. 234; *Vavasour's case*, 2 Leon. 222; *Anon.*, 4 Lev. 240; *Kimpton v. Eve*, 2 V. & B. 349; 13 R.R. 116. See *Maynard v. Gibson*, W.N. (1876) 204, for declaration that tenant for life was not entitled to deer and pigeons absolutely, but only to their reasonable enjoyment.

Chap. IV.
Sect. 2.

of the fish-pond to get out of repair so that the fish escape or the pond dries up (*m*). If the lessee of a warren by charter or prescription plough up the land, it is waste (*n*); but it is otherwise if it be only land stored with conies and not a legal warren; and stopping up and digging cony burrows is not waste in a warren (*o*). Deer in a lawful park are part of the inheritance: it is waste in a tenant for life to do anything to sever the deer from the inheritance; and it seems that reclaiming deer is an act of waste, because it makes them no longer venison in a park, but chattels like any other domesticated animals (*p*).

Waste in walls
of the sea or
banks of rivers.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh be surrounded, whereby it become unprofitable; but if it be surrounded suddenly by the rage and violence of the sea, without any default of the tenant, it is not waste (*q*). So also (*semble*) it is waste if the tenant do not repair the banks or walls against rivers or other waters, whereby the meadows or marshes be surrounded and become rushy and unprofitable (*r*).

Waste in mines,
&c.

It is waste if a tenant for life or for years dig for clay, gravel, lime, brick earth, minerals, stones, or the like (*s*). If there be a grant of lands, or of lands and mines expressly, he may dig and take the profits of mines, gravel pits, or clay pits, open at the time of the grant, or which a preceding tenant in tail under the settlement, or other person rightfully entitled to open, may have opened, but he may not open new ones (*t*). Nor does a power to lease with the mines land on

(*m*) Co. Litt. 53 a; Hob. 234; *Bathurst v. Burden*, 2 Bro. C. C. 64.

(*n*) Co. Litt. 53 b; *Angerstein v. Hunt*, 6 Ves. 487.

(*o*) *Lurting v. Conn*, 1 Ir. Ch. 273.

(*p*) *Ford v. Tynte*, 2 J. & H. 153, *per* Wood, V.-C.

(*q*) Co. Litt. 53 b; Bro. Ab. Waste.

(*r*) Co. Litt. 53 b; Callis on Sewers, 146.

(*s*) Bro. Ab. Waste, pl. 93; Co.

Litt. 53 b; 2 Roll. Ab. 816. See, however, the alterations made by statute, *post*, p. 80.

(*t*) Co. Litt. 54 b; *Saunders' case*, 5 Co. Rep. 12 a; *Vinier v. Vaughan*, 2 Beav. 469; *Huntley v. Russell*, 13 Q. B. 591; *Bagot v. Bagot*, 32 Beav. 509; *Clegg v. Rowland*, 2 Eq. 160. See as to whether mines are open or not, *Elias v. Snowdon Slate Quarries*, 4 App. Ca. 465; *Greville-Nugent v. Mackenzie*, (1900) A. C. 83. See as to working gravel pits so as

which there are both open and unopened mines authorise a lease of unopened mines (*u*).

As a tenant for life or years is entitled to continue the working of mines which were open at the time he came in, so he may use all means necessary for working them. He may, if it can be done without any special damage to the inheritance, sink new shafts and pits to follow the same vein of coal (*x*), or to reach new seams lying under the old seams (*y*). But it is doubtful whether he has a right to open pits or mines which have been abandoned, or the preparations for opening which have not been completed. The question must always depend on the circumstances of each particular case (*z*).

The rule that a tenant for life or years may continue the working of open mines, gravel or clay pits, extends to the case of quarries of slate or limestone, which have been worked by the owner of the inheritance for the purpose of making a profit; but it seems that the rule does not apply to cases where stone or slate has been dug out of a quarry for the purpose of building or repairing houses on the property, and not for the purpose of profit (*a*).

The words "mines and minerals" in an instrument include stone gotten by underground working, unless there is something in the nature or context of the deed to show that it was not intended to be included (*b*). A quarry refers to a place upon, or above, and not under the ground, whereas the word mine refers to underground workings (*c*).

to destroy the surface, *Ellis v. Bromley Local Board*, 45 L. J. Ch. 763, W. N. (1876) 156.

(*u*) *Clegg v. Rowland*, 2 Eq. 160.

(*z*) *Whitfield v. Bewit*, 2 P. Wms. 240; *Clavering v. Clavering*, ib. 388; *Viner v. Vaughan*, 2 Beav. 469; *Elias v. Snowdon Slate Quarries*, 4 App. Ca. 466, per Lord Selborne. See *In re Maynard's Settled Estate*, (1899) 2 Ch. 351.

(*y*) *Spencer v. Scurr*, 31 Beav. 334.

(*z*) *Viner v. Vaughan*, 2 Beav. 469; 50 R. R. 245; *Bagot v. Bagot*, 32 Beav. 509, 516; *Clinch v. Depson*, 78 L. T. Jo. 321.

(*a*) *Elias v. Snowdon Slate Quarries*, 4 App. Ca. 465.

(*b*) *Bell v. Wilson*, 1 Ch. 303; *Midland Railway Co. v. Checkley*, 4 Eq. 25. See *Midland Railway Co. v. Haunchwood, &c., Railway Co.*, 20 Ch. D. 552.

(*c*) *Bell v. Wilson*, 1 Ch. 303.

Chap. IV.
Sect. 2.

Reservation and
exception of
minerals.

The reservation of minerals includes all reasonable means of getting them (*d*).

A reservation of "minerals" includes every substance which can be got from underneath the surface of the earth, whether by mining or quarrying, for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning (*e*). The test, however, is not whether the substances in question can be worked at a market profit at the time, but whether they have a use and a value independent of and separate from the rest of the soil (*f*). A reservation of mines and minerals in a farming lease does not indicate an intention to exclude a custom of the country for tenants to remove and sell flints which come to the surface in the ordinary course of agricultural operations so as to deprive the tenant of this right (*g*).

Estovers of
gravel, clay, and
minerals.

A tenant for life or years may take reasonable estovers of gravel and clay for the repairs of buildings, although the pits were not open at the date of the grant or demise (*h*). There may be also estovers of brick earth, lime, or the like, for the reparation of buildings or manuring the land (*i*). So also may there be estovers of coal (*k*). If there are open quarries of limestone on the land, the tenants may work them for estovers (*l*).

Turbary.

A tenant for life or years of land comprising turves has a right to cut by way of estovers as many turves as may be reasonably sufficient for consumption on the premises by way of firebote (*m*), but he may not cut turves for the purposes of

(*d*) *Earl of Cardigan v. Armitage*, 2 B. & C. 197; 26 R. R. 313; *Proud v. Bates*, 34 L. J. Ch. 411. See *Harris v. Ryding*, 5 M. & W. 60; *Goold v. Great Western Deep Coal Co.*, 2 D. J. & S. 600; *Mordue v. Dean and Chapter of Durham*, 8 C. P. 336; *Hayles v. Pease and Partners, Ltd.*, (1899) 1 Ch. 567.

(*e*) *Hext v. Gill*, 7 Ch. 712.

(*f*) *Earl of Jersey v. Neath Union*, 22 Q. B. D. 562, per Bowen, L.J.; *Johnstone v. Crompton & Co.*,

(1899) 2 Ch. 190, 197.

(*g*) *Tucker v. Linger*, 21 Ch. D. 36, 8 App. Ca. 508.

(*h*) 2 Roll. Ab. 816.

(*i*) Co. Litt. 53 b, 54 b; *Saunders' case*, 5 Co. Rep. 12 a.

(*k*) 2 Roll. Ab. 816.

(*l*) *Purcell v. Nash*, 1 Jon. 625; *Mansfield v. Crawford*, 9 Ir. Eq. 271.

(*m*) *De Salis v. Crossan*, 1 Ba. & Be. 188; 12 R. R. 12; *Lord Courtown v. Ward*, 1 Sch. & Lef. 8; *Howley v. Jebb*, 8 Ir. C. L. 435.

sale (*n*), unless turves have always been so cut, or unless there is no other mode of enjoying the land (*o*).

Chap. IV.
Sect. 2.

The right of turbary only applies to turves adapted for the purposes of fuel, and does not apply to turves of grass (*p*).

A copyholder, whether of inheritance or for life, or for years only, has the same possessory interest in mines as he has in trees (*q*). By custom a copyholder of inheritance may have the right to break the surface and dig gravel, sand, and clay, without stint, from out of his own tenement for the purposes of sale off the manor (*r*). So also may a customary tenant have the right by custom to work mines for profit on his own copyhold tenement (*s*). But in the absence of custom the tenant cannot, without the leave of the lord, open or work new mines or work quarries upon his own tenement, nor on the other hand can the lord, in the absence of a custom, open and work mines upon the tenement of a copyholder (*t*).

Interest of copyholder in mines, clay, gravel, &c:

If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring an action against the stranger to recover the minerals (*u*). The right of the lord of a manor to minerals is a right of property to the mineral substance only, subject to which the copyholder has an estate in the soil throughout. If the lord has removed minerals, the space left belongs to the copyholder (*u*).

Right of lord to minerals in copyholds.

(*n*) *Coppinger v. Gubbins*, 3 J. & L. 410; *Howley v. Jebb*, 8 Ir. C. L. 435; *Wakefield v. Hendron*, 11 L. R. I. 505.

(*o*) *Coppinger v. Gubbins*, 3 J. & L. 410; *Stevenson v. Moore*, 7 Ir. Ch. 462. See, as to grants of turbary, *Hill v. Barry*, Hay. & J. 688; *Hargrove v. Congleton*, 12 Ir. C. L. 362, 368.

(*p*) See *Wilson v. Willes*, 7 East, 121; 8 R. R. 604; *Wilkinson v. Haygarth*, 12 Q. B. 837.

(*q*) *Scriv. on Cop.* 296; *Eardley v. Lord Granville*, 3 C. D. 832. See *Bowser v. Maclean*, 2 D. F. & J. 415.

(*r*) *Marquis of Salisbury v. Glad-*

stone, 9 H. L. C. 692; *Hanmer v. Chance*, 4 D. J. & S. 626.

(*s*) *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Parrott v. Palmer*, 3 M. & K. 632; 41 R. R. 149; *Duke of Portland v. Hill*, 2 Eq. 765.

(*t*) *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Grey v. Duke of Northumberland*, 13 Ves. 236, 17 Ves. 281; *Bourne v. Taylor*, 10 East, 189; 10 R. R. 267; *Cuddon v. Morley*, 7 Ha. 204; *Duke of Portland v. Hill*, 2 Eq. 765; *Eardley v. Lord Granville*, 3 C. D. 832.

(*u*) *Eardley v. Lord Granville*, 3 C. D. p. 833.

Chap. IV.
Sect. 2.

The lord of a manor, in the absence of custom, is entitled to every substance which can be got underneath the surface of the earth in a copyhold tenement for the purpose of profit (*x*). Although in the case of copyholds the property in the mines and minerals is in the lord, the concurrence of the tenant is necessary, as a rule, in order that the minerals may be worked (*y*); and accordingly a copyholder may obtain an injunction against the lord entering and digging for minerals under his tenement (*z*). It seems open to question, however, whether the lord is not free to work the minerals without the concurrence of the tenant, provided that he does so by underground workings and without entering upon or interfering with the surface (*a*).

Right of lord of manor to take gravel, &c., &c., in the waste of the manor.

The lord of a manor may take gravel, marl, loam, turves, &c., in the waste of the manor, so long as he does not infringe upon the rights of the commoners. His right exists by reason of his ownership of the soil, and is quite independent of the right of appurement under the Statute of Merton or at common law. There is no ground of distinction between the lord's "digging and cutting" simply, and "digging and cutting for purposes of sale." The burthen of proving that he avails himself unduly of this right lies on the tenants. In the case of appurement the *onus probandi* is on the lord, upon the ground that the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that he has left sufficient to enable the tenants to enjoy the right of common granted (*b*).

Waste by alteration of character of land.

Any permanent alteration of the character of land, such as the conversion of meadow into arable land by ploughing it up, or arable land into wood, or a meadow into an orchard, is waste, even although the value of the land be increased, because it not only changes the course of husbandry, but affects

(*x*) *Att.-Gen. v. Tomline*, 5 C. D. 750.
762; 15 C. D. 150; *Hext v. Gill*, 7 Ch. 712.

(*y*) *Hext v. Gill*, 7 Ch. 712;
Eardley v. Lord Granville, 3 C. D. 832.

(*z*) *Att.-Gen. v. Tomline*, 5 C. D.

750.
(*a*) *Scriven*, 298; and see *Bowser v. Maclean*, 2 D. F. & J. 415.

(*b*) *Hall v. Byron*, 4 C. D. 667;
Bell v. Love, 10 Q. B. D. 558;
Robertson v. Hartopp, 43 C. D. 484, 499.

the proof of title (c). But a mere temporary alteration in the ordinary and reasonable course of husbandry is not waste (d). The enclosure and cultivation of waste land may be waste by reason of the injury to the evidence of title (e).

Chap. IV.
Sect. 2.

By the general law a tenant for life or for years is under no obligation to cultivate land. It is not waste to suffer arable ground to lie fresh and not manured, so that it grows full of thorns: it is merely bad husbandry (f). To oblige a man to cultivate according to good husbandry, there must be either an express contract or a custom of the country (g). A custom of the country need not have existed from time immemorial, as must a custom properly so called. It is sufficient if there be a general usage applicable to farms in the part of the country in which the land is situated (h). The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use a farm in a husbandlike manner according to the custom of the country where the premises are situated (i), unless, indeed, the lease or agreement contain some express covenant or premise inconsistent with such custom and sufficient to exclude it (k). The removal of hay, straw, dung, crops, &c., from a farm is waste, where it is contrary to the custom of the country, and will be restrained

Waste by bad
cultivation of
land.

(c) Co. Litt. 53 b; *Lord Darcy v. Askwith*, Hob. 234; *Worsley v. Stewart*, 4 Bro. P. C. 377; *Simmons v. Norton*, 7 Bing. 647; 33 R. R. 588; *Goring v. Goring*, 3 Sw. 661; *West Ham Central Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. 624; but see *Meux v. Copley*, (1892) 2 Ch. 253; and see Agricultural Holdings Act, 1883, s. 42.

(d) 2 Roll. Ab. 814; *Viner*, Ab. tit. Waste; *Maleverer v. Spinke*, Dyer, 37 a; *Simmons v. Norton*, 7 Bing. 647; 33 R. R. 588; *Cruise*, Dig. tit. iii. c. 2, s. 19; *Gibbon on Dilap.* 198.

(e) *Queen's College v. Hallett*, 14 East, 489; 13 R. R. 293. See observations on this case in *West Ham Charity v. East London Waterworks Co.*, (1900) 1 Ch. 624.

(f) Bro. Ab. Waste, pl. 5; 2 Roll. Ab. 814; *Hutton v. Warren*, 1 M. & W. 472; 46 R. R. 368.

(g) *Hutton v. Warren*, 1 M. & W. 472; 46 R. R. 368, per Lord Wensleydale.

(h) *Leigh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 1 B. & R. 224; 21 R. R. 577; and see *Tucker v. Linger*, 21 C. D. 36; 8 A. C. 508.

(i) *Powley v. Walker*, 5 T. R. 373; 2 R. R. 619; *Halifax v. Chambers*, 4 M. & W. 662; *Beale v. Saunders*, 3 Bing. N. C. 850; *Woodfall*, 16th ed. 186.

(k) *Hutton v. Warren*, 1 M. & W. 466; 46 R. R. 368; *Clark v. Royston*, 13 M. & W. 752; *Wilkins v. Wood*, 17 L. J. Q. B. 319; *Woodfall*, 16th ed. 186.

Chap. IV.
Sect. 2.

by injunction (*l*). So also the sowing of lands with pernicious crops, such as mustard, is waste, and will be restrained (*m*).

The obligation to cultivate lands according to the custom of the country does not apply to a garden or meadow let with a gentleman's residence (*n*).

Waste in
buildings.

Waste in houses or buildings consists either in pulling them down or in suffering them to go to decay (*o*). The law of waste extends not only to dwelling-houses, but to every description of buildings, such as outhouses and barns (*p*). An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased. Thus, the converting two chambers into one, or *è converso*, or the converting a hand-mill into a horse-mill, or a corn-mill into a fulling-mill, or a malt-mill to a corn-mill, or a logwood-mill to a cotton-mill, have been held to be waste (*q*). So also the conversion of a private house into a shop is waste (*r*). So also may the building of a new house, where there was one before, be waste, if it impair the evidence of title (*s*). In *Smith v. Carter* (*t*) the Court restrained a man from pulling down a house and building another which the landlord objected to. "It is not sufficient," said Lord Romilly, M. R. (*u*), "that the house proposed to be built is a better one. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change: if

(*l*) *Pulteney v. Shelton*, 5 Ves. 147, 260, n.; — *v. Onslow*, 16 Ves. 173; *Kimpton v. Ere*, 2 V. & B. 349; 13 R. R. 116; *Pratt v. Brett*, 2 Madd. 62; 17 R. R. 187; *Walton v. Johnson*, 15 Sim. 352.

(*m*) *Pratt v. Brett*, 2 Madd. 62; 17 R. R. 187.

(*n*) *Johnstone v. Symons*, 9 L. T. O. S. 535; *Gibbon on Dilap.* 202. See, as to cultivation of glebe land, *Bird v. Relph*, 4 B. & Ad. 826; 38 R. R. 382.

(*o*) Co. Litt. 53 a. See *Kimpton v. Ere*, 2 V. & B. 353; 13 R. R. 116.

(*p*) *Doe v. Earl of Burlington*, 5 B. & Ad. 507; 39 R. R. 549.

(*q*) Co. Litt. 53 a; *Green v. Cole*, 2 Willm. Saund. 228; *City of London v. Graeme*, Cro. Jac. 182; *Brydges v. Kilburn*, cit. 5 Ves. 689; 5 R. R. 146; *Hunt v. Browne*, Sau. & Sc. 191; but see *Grand Canal Co. v. McNamee*, 29 L. R. Ir. 131 (C. A.).

(*r*) *Bonnett v. Sadler*, 14 Ves. 526; 9 R. R. 341; *Doggett v. Curuow*, 1 Set. 553; *Maunsell v. Hort*, 1 L. R. I. 88.

(*s*) Co. Litt. 53 a; *Cole v. Green*, 1 Lev. 309; S. C., nom. *Cole v. Forth*, 1 Mod. 94. But see *Jones v. Chappell*, 20 Eq. 539.

(*t*) 18 Beav. 78.

(*u*) *Ib.*

he objects, the Court will not allow a tenant to pull down one house and build another in its place" (x).

But in *Doherty v. Allman* (y), where land with buildings which had been used as stores was leased for a very long period, and the buildings had fallen out of repair, and the lessee was proceeding to convert the stores into dwelling-houses, which would much increase their value, the Court refused to interfere by injunction.

A covenant to repair being positive as well as negative in its obligations, the tenant is thereby bound as well not to do an act amounting to voluntary waste as to repair dilapidations (z). The existence in a lease of a covenant to repair and to surrender up the buildings at the end of the term in good condition, does not preclude the Court from granting an injunction to restrain the pulling down of buildings just before the end of the term (a).

The suffering houses, buildings, &c., to go to decay by wrongfully neglecting to repair them is permissive waste. An action on the case for permissive waste lies against a tenant for life or years upon whom an express duty to repair is imposed by the instrument which creates the estate (b). There are also authorities at law to show that an action on the case for permissive waste can be maintained against a tenant for life or years, even though no express duty is imposed on him by the instrument which creates the estate (c). But it seems to be now settled that, as a general rule, in the absence of express agreement, there is no liability on a tenant for life or a tenant for years for mere permissive waste (d). Where, however, a

(x) *Maunsell v. Hort*, 1 L. R. I. 88. See Bro. Ab. Waste; Cruise, Dig. tit. iii. c. 2, s. 12.

(y) 3 App. Ca. 709; and see *Meux v. Copley*, (1892) 2 Ch. 253; *West Ham Charity Board v. East London Waterworks Co.*, (1900) 1 Ch. p. 635.

(z) *Doe v. Jackson*, 2 Stark. 293; *Ihe v. Bird*, 6 Car. & P. 195; 41 R. R. 408; Gibbon on Dilap. 153.

(a) *Mayor of London v. Hedger*, 18 Ves. 356.

(b) *Woodhouse v. Walker*, 5 Q. B. D. 404; and see *Jenks v. Clifden*, (1897) 1 Ch. 694.

(c) *Green v. Cole*, 2 Willm. Saund. 646; *Yellowly v. Gower*, 11 Exch. 294; *Davies v. Davies*, 38 C. D. 499.

(d) *In re Cartwright, Avis v. Newman*, 41 C. D. 532; *Dimond v. Newburn*, (1898) 1 Ch. p. 32; *In re*

Chap. IV.
Sect. 2.

lessee who is bound by his lease to keep the premises in repair, bequeaths the lease to persons in succession, the tenant for life under the will is bound, as between himself and the testator's estate, to keep the property in repair, so far as the want of repair arises during the continuance of his interest (e). By the custom of certain manors, the copyhold tenants are bound to keep their holdings in repair (f).

Fixtures.

The general rule of law is that personal chattels once annexed to the freehold become part of it, and may not be again severed without the consent of the owner of the inheritance, and that it is therefore waste if a tenant for life or years who has annexed a personal chattel to the freehold afterwards takes it away (g). But many exceptions have been engrafted on this general rule, the most important being in favour of trade fixtures. Chattels which have been affixed to the freehold for the purposes of trade (h), and which retain the general character of trade fixtures, may be removed by a tenant for years during his term (i). The exception does not, however, extend to buildings which have been let into the soil, although used for trading purposes. A tenant for years, even under the most favourable circumstances, has no right (k) to remove any building which he has erected merely because it is used only for the purposes of trade (l).

The indulgence which exists with respect to trade fixtures extends also to many cases of fixtures put up by a tenant for

Parry and Hopkin, (1900) 1 Ch. 210; *Foley v. Addenbroke*, 13 M. & W. 174; *Ward v. Countess of Dudley*, 57 L. T. 20.

(e) *In re Betty*, (1899) 1 Ch. 821; *Re Giers*, (1899) 2 Ch. 54. But see *Re Parry and Hopkin*, (1900) 1 Ch. 160.

(f) See *Blackmore v. White*, (1899) 1 Q. B. 293.

(g) *Elwes v. Maw*, 3 East, 38; 6 R. R. 523.

(h) See *Mears v. Callender*, (1901) 2 Ch. 388.

(i) *Lawton v. Lawton*, 3 Atk. 18; *Elwes v. Maw*, 3 East, 38; 6 R. R. 523; 2 Smith, L. C. 207—

(k) But see *post*, p. 80.

(l) *Penton v. Robart*, 2 East, 90; 6 R. R. 376; *Elwes v. Maw*, 3 East, 38; 6 R. R. 523; 2 Smith, L. C. 208; *Whitehead v. Bennett*, 27 L. J. Ch. 474. But see *Mears v. Callender*, (1901) 2 Ch. 388. See, as to right of miners in certain districts to remove buildings erected for mining purposes, *Wake v. Hall*, 8 App. Ca. 195; see also *Ward v. Countess of Dudley*, 57 L. T. 20.

years at his own expense for the purposes of ornament or domestic convenience, such as marble chimney-pieces, pier glasses, wainscots fixed with screws, hangings nailed to the walls, stoves or grates fixed into the chimney with brickwork, and cupboards supported by holdfasts and the like (*m*). The privilege with respect to the removal of this class of fixtures must, however, be regarded as one of more limited extent than obtains in the case of trade fixtures (*n*).

Chattels which have been annexed to the freehold by a tenant for years, if removable at all, should be removed by him before the expiration of the tenancy (*o*); or at all events before the expiration of such further period of possession as he holds the premises under a right still to consider himself as tenant (*p*). A tenant whose interest is of an uncertain duration has, it would appear, a right to remove fixtures after it has expired, provided he does so within a reasonable time (*q*).

Questions respecting the right to fixtures may arise also between tenant for life and remainderman, between heir and executor, between vendor and vendee, between mortgagor and mortgagee, and in other cases (*r*). In cases between the devisee or heir-at-law and the executor the general rule of law obtains with the most rigour in favour of the inheritance and against the right to consider as a personal chattel anything which has been annexed to the freehold (*s*). "In these cases

(*m*) *Squier v. Mayer*, Freem. Ch. 248; 2 Eq. Ab. 430; *Beck v. Rebow*, 1 P. Wms. 94; *Ex parte Quincy*, 1 Atk. 477; *Lawton v. Lawton*, 3 Atk. 15; *Lee v. Risdon*, 7 Taunt. 191; 17 R. B. 484, *per* Gibbs, C. J.; *Rex v. St. Dunstan's*, 4 B. & C. 686, *per* Bayley, J.; *In re De Falbe*, *Ward v. Taylor*, (1901) 1 Ch. 523 (C. A.); S. C. under name of *Leigh v. Taylor*, (1902) A. C. 157.

(*n*) See *Buckland v. Butterfield*, 2 B. & B. 54; 22 R. B. 649; *Jenkins v. Gething*, 2 J. & H. 520; *Ferard on Fixtures*, 110 *et seq.*

(*o*) *Lyde v. Russell*, 1 B. & Ad.

394; 35 R. B. 327; *Pugh v. Arton*, 8 Eq. 626.

(*p*) *Weeton v. Woodcock*, 7 M. & W. 14; *Barff v. Probyn*, 73 L. T. 118.

(*q*) See *Weeton v. Woodcock*, 7 M. & W. 14; *Ferard Fixt.* 134.

(*r*) 2 Smith, L. C. 215; *Ferard on Fixt.* 166—240; *Haley v. Hammersley*, 3 D. F. & J. 587; *Southport Banking Co. v. Thompson*, 37 Ch. D. 64; *In re De Falbe*, *Ward v. Taylor*, (1901) 1 Ch. 523 (C. A.); S. C. under name *Leigh v. Taylor*, (1902) A. C. 154; *Monti v. Barnes*, (1901) 1 Q. B. 205 (C. A.).

(*s*) See 2 Smith, L. C. 215;

Chap. IV.
Sect. 3.

no question of injustice arises. There is no injustice, no forfeiture of any property, when a man who is owner in fee affixes his own chattels to the freehold" (t). In cases between the executors of a tenant for life and the remainderman the right to fixtures is considered more favourably for the executors (u), but not so favourably as in favour of a tenant for years in cases between landlord and tenant (x). Successive incumbents of a benefice stand to each other somewhat in the relation of tenant for life and remainderman, but in respect of the right to fixtures the law is much more liberal in favour of a deceased incumbent than in the ordinary case of tenant for life and remainderman (y). In cases between vendor and vendee, or mortgagor and mortgagee, questions respecting the right to fixtures depend on the terms of the contract. If, however, the contract is silent on the subject, the general rule is against the right to consider as a personal chattel anything which has been annexed to the freehold (z).

SECTION III.—PERSONS FOR AND AGAINST WHOM INJUNCTIONS ARE GRANTED.

Waste by tenant
for life.

AN estate for life, whether it be given expressly by the instrument which creates it, or whether it arises from equitable considerations, is always impeachable of waste, unless the contrary be provided by express stipulation (a). The application

Ferard on Fixt. 211—249; and see *Norton v. Dashwood*, (1896) 2 Ch. 497.

(t) *Per* Stirling, I. J., in *In re De Falbe, Ward v. Taylor*, (1901) 1 Ch. p. 541.

(u) *In re De Falbe, Ward v. Taylor*, (1901) 1 Ch. 523; S. C. under name of *Leigh v. Taylor*, (1902) A. C. 157.

(x) 2 Smith, L. C. 214; Ferard on Fixt. 166—186.

(y) *Martin v. Roe*, 7 E. & B. 237. See Ferard on Fixt. 191—203.

(z) See 2 Smith, 222; Ferard on Fixt. 274—290; *Huley v. Hammersley*, 3 D. F. & J. 587; *Longbottom v. Berry*, L. R. 5 Q. B. 137; *Ex parte Astbury*, 4 Ch. 635; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Holland v. Hodgson*, L. R. 7 C. P. 337; *Climie v. Wood*, L. R. 4 Ex. 328; *Southport Banking Co. v. Thompson*, 37 C. D. 64; *Hobson v. Gorrings*, (1897) 1 Ch. 182; *Monti v. Barnes*, (1901) 1 Q. B. 205 (C. A.).

(a) *Cole v. Peyson*, 1 Ch. Rep. 57; *Whitfield v. Bewit*, 2 P. Wms. 240.

for an injunction to restrain a tenant for life or for years from committing waste is usually made by the owner of the inheritance, but the application may be made by a remainderman for life, as well as by the owner of the inheritance; and even without making the persons entitled to the inheritance parties to the action (*b*). The intervention of an intermediate estate for life does not deprive the owner of the inheritance or a remainderman for life of his right to an injunction (*c*). So, also, trustees to preserve contingent remainders may bring a bill to stay waste against a tenant for life (*d*). In *Garth v. Cotton*, Lord Hardwicke held that trustees to preserve contingent remainders might have an injunction against a tenant for life and a remote remainderman colluding to commit waste while the remainders were in expectancy (*e*). It would appear that trustees to preserve contingent remainders may not only bring a bill to stay waste, but are bound to do so for the benefit of the contingent remainders (*f*).

If the legal estate is in trustees upon trust for a tenant for life, with remainders over, and the tenant for life commits waste, the trustees have a right to file a bill to stay the waste (*g*), and it is their duty to do so, if parties unborn are interested (*h*). A remainderman, however, need not look to the trustees for protection (*i*); and even where an estate is vested in trustees upon trust to sell and divide the proceeds amongst a class of persons, any member of that class may apply for an injunction to restrain the tenant for life from committing waste (*i*).

Order 16, r. 37, provides that in all cases of actions for the prevention of waste or otherwise for the protection of property,

- | | |
|---|---|
| (<i>b</i>) <i>Mollineux v. Powell</i> , 3 P. W. 268, n. | (<i>f</i>) <i>Stansfield v. Habbergham</i> , 10 Ves. 278, <i>per</i> Lord Eldon; 7 R. R. 409. |
| (<i>c</i>) <i>Tracy v. Tracy</i> , 1 Vern. 23; <i>Farrant v. Lovell</i> , 3 Atk. 723. | (<i>g</i>) <i>Denton v. Denton</i> , 7 Beav. 388; <i>Pugh v. Vaughan</i> , 12 Beav. 517, 520. |
| (<i>d</i>) <i>Perrot v. Perrot</i> , 3 Atk. 94; <i>Garth v. Cotton</i> , <i>ib.</i> 751; 1 Dick. 183; 1 Ves. Sen. 524, 546; Wh. & T. ii. 970. | (<i>h</i>) <i>Ib.</i> |
| (<i>e</i>) See <i>Williams v. Duke of Bolton</i> , 1 Cox, 72; 3 P. Wms. 469; 50 R. R. 245. | (<i>i</i>) <i>Viner v. Vaughan</i> , 2 Beav. |

Chap. IV.
Sect. 3.

one person may sue on behalf of himself and all persons having the same interest.

The remainderman of an undivided share of the inheritance may have an injunction and an account (*k*). When an estate for life is given with certain directions which impose an obligation on the tenant for life not to be guilty of waste, either voluntary, or permissive, the Court will interpose to prevent either him or his alienee from doing any act which would be a breach of the condition or obligation (*l*).

Waste between
coparceners,
joint tenants,
and tenants in
common.

As between coparceners, joint tenants, or tenants in common, the Court will not interpose to restrain waste (*m*), unless the wrongdoer is insolvent, or incapable of paying to the other the excess of the value beyond his own share (*n*), or is occupying tenant to the other (*o*), or unless the waste amounts to destructive waste, or spoliation (*p*).

Tenant in tail in
possession.

A tenant in tail in possession is punishable of both legal and equitable waste, because he may at any time bar the entail, and acquire the absolute fee simple (*q*). It has been held that an infant tenant in tail in possession has the same right as one of full age against the remainderman, and that his guardians might commit waste, although by converting the nature of the property from realty into personalty the next of kin of the infant would, in the event of his death, be benefited at the expense of the remainderman (*r*). In *Saville's case* (*s*), Lord King would not restrain by injunction the guardians of an infant tenant in tail in possession from cutting timber, whilst the infant was in very bad health. After the death of the infant, which took place shortly afterwards, a bill by a remain-

(*k*) Co. Litt. 53 b; *Whitfield v. Bewit*, 2 P. W. 241. 10 R. R. 141.

(*l*) *Kingham v. Lee*, 15 Sim. 396. See *Blagrove v. Blagrove*, 1 De G. & S. 253.

(*m*) *Twort v. Twort*, 16 Ves. 129. See *Bailey v. Hobson*, 5 Ch. 182, where a decree had been made in a partition suit.

(*n*) *Smallman v. Onions*, 3 Bro. C. C. 620.

(*o*) *Twort v. Twort*, 16 Ves. 128;

(*p*) *Durham and Sunderland Railway Co. v. Wawn*, 3 Beav. 119; *Arthur v. Lambe*, 2 Dr. & Sm. 428; *Bailey v. Hobson*, 5 Ch. 180; *Job v. Potton*, 20 Eq. 84 (mine), and see *Watson v. Gray*, 14 C. D. 192 (party wall).

(*q*) 3 Madd. 532; 2 D. F. & J. 246.

(*r*) *Lyddall v. Clavering*, cited Amb. 371; and see C. A. 1881, s. 42.

(*s*) Cited Forr. 16 Mose. 224.

derman for an account against his assets was dismissed (*t*). An injunction may be had against the guardian of an infant tenant in tail, if the application be made on behalf of the infant (*u*). The right to be dispunishable of waste extends not only to the grantee of a tenant in tail, but also to the grantee of such grantee (*x*). A tenant in tail must exercise his powers in respect to waste during the continuance of his estate, for at the instant of his death they cease (*y*).

Chap. IV.
Sect. 3.

A tenant in tail after possibility of issue extinct, who has been once in possession, is in respect of the estate of inheritance, which has been once in him, as dispunishable of waste as a tenant for life, who is made so by express limitation (*z*); but he may not, any more than a tenant for life dispunishable for waste, commit equitable waste (*a*).

Tenant in tail
after possibility
of issue extinct.

The privileges of tenant in tail after possibility of issue extinct are in respect of the privity of his estate and of the inheritance that was once in him: if, therefore, he conveys his estate to another, such person will be considered as a mere tenant for life (*b*).

A tenant in tail with the reversion in the Crown, and tenant in tail under an Act of Parliament which precludes the barring of the entail have all the legal rights and incidents which belong to a tenancy in tail, and are dispunishable of waste whether legal or equitable (*c*). But where the rights and incidents of the tenancy in tail are specially qualified by the provisions of the Statute, the Court may feel bound to interfere to prevent equitable waste (*d*).

Tenant in tail
with the rever-
sion of the
Crown.

(*t*) See *Tullitt v. Tullitt*, Amb. 370; *Lyddall v. Clavering*, ib. 371, n.

(*u*) *Hussey v. Hussey*, 5 Madd. 44; 21 R. R. 275. See *Roberts v. Roberts*, Hard. 96.

(*x*) 8 Bac. Ab. 392.

(*y*) *Roberts v. Roberts*, Hard. 96; Cruise, Dig. tit. ii. c. 1, s. 32.

(*z*) *Lewis Bowle's case*, 11 Co. Rep. 79 b; *Williams v. Williams*, 15 Ves. 430; 11 R. R. 357, n.; *Turner v. Wright*, 2 D. F. & J. 247.

(*a*) *Abraham v. Bubb*, Freem. ch. 52; 2 Sw. 172, n.; *Turner v. Wright*, 3 D. F. & J. 247.

(*b*) Co. Litt. 28 a; *Rice's case*, 3 Leon. 241.

(*c*) *Att.-Gen. v. Duke of Marlborough*, 3 Madd. 540; 18 R. R. 273; *Davis v. Duke of Marlborough*, 2 Sw. 108; 53 R. R. 32; *Turner v. Wright*, 2 D. F. & J. 246.

(*d*) *Att.-Gen. v. Duke of Marlborough*, 3 Madd. 548; 18 R. R. 273; *Turner v. Wright*, 2 D. F. & J. 246.

Chap. IV.
Sect. 3.

Tenant in fee,
subject to
executory devise
over.

Heir by resulting
trust.

A tenant in fee simple, subject to an executory devise over is within the principle of equitable waste, but he is punishable of legal waste (e), unless the testator has imposed on him a condition not to commit waste (f).

An heir taking by resulting trust until the happening of a contingency, is within the principle of equitable waste (g).

Where a tenant for life under a will, who was also appointed executrix. "with full and absolute control" over all the testator's property, cut and sold timber, it was held that the will did not make the tenant for life punishable for waste, but only entitled her to cut timber in a due course of management for the benefit and preservation of the estate (h).

Tenant by lease
for lives renew-
able for ever.

The well-known tenure so common in Ireland by lease for lives renewable for ever was considered by Lord Redesdale so much in the nature of a perpetuity, that he refused an application for an injunction to restrain the cutting of timber (i). But Lord St. Leonards, after a review of all the authorities, disapproved of this decision, and held that a lessee for lives renewable for ever is not at liberty to commit destructive waste (j). But he may, it would appear, commit meliorating waste (k). He may not, however, commit equitable waste, though he has been made expressly unimpeachable of waste (l).

Waste by copy-
holders.

A bill for an injunction against waste will lie at the suit of a copyholder against his lessee (m), of a copyholder in remainder against a copyholder for life (n), or of a copyholder against the lord of the manor (o). So, also, a bill for an injunction against waste will lie at the suit of a lord of a manor

(e) *Turner v. Wright*, John. 746; 2 D. F. & J. 234.

(f) *Blake v. Peters*, 1 D. J. & S. 345.

(g) *Stansfield v. Haberglam*, 10 Ves. 273; 7 R. R. 409.

(h) *Pardoe v. Pardoe*, 82 L. T. 547.

(i) *Calvert v. Gason*, 2 Sch. & L. 561.

(j) *Coppinger v. Gubbins*, 3 J. & L. 397, 411.

(k) *Coppinger v. Gubbins*, 3 J. & L. 397.

(l) *Pentland v. Somerville*, 2 Ir. Ch. 289.

(m) *Dalton v. Gill*, Cary, 89, 90.

(n) *Cornish v. New*, Finch, 220; *Caldwell v. Baylis*, 2 Mer. 408; 16 R. R. 189.

(o) *Bowser v. Maclean*, 2 D. F. & J. 415; *Eardley v. Lord Granville*, 3 Ch. D. 826.

against his copyhold tenants (*p*), or their under-tenants (*q*), and an interlocutory injunction has been granted, although the answer denied that the lands were copyhold (*r*).

Chap. IV.
Sect. 3.

A mortgagee in possession with a sufficient security may not commit waste (*s*); and he is bound, so far as the rents and profits in his hands will admit, to do necessary repairs (*t*). If, however, the security is insufficient, he is entitled, so long as he is acting *bonâ fide*, to make the most of the property for the purpose of discharging what is due to him. He may cut timber, and open mines or quarries, but he does so at his own risk and peril. If he incurs a loss, he cannot charge it against the mortgagor, and if he obtains a profit, the whole of that profit must go in discharge of the mortgage debt (*u*). If the security is sufficient, and he has no authority from the mortgagor (*x*), he will under similar circumstances be charged with his receipts and disallowed his expenses (*y*). If the mortgage be of an open mine, the mortgagee is entitled to work it as a prudent owner would do, and he is not bound to advance money for speculative improvements (*z*).

Waste by mortgagee in possession.

In the case of any mortgage made by deed after the 31st December, 1881, the mortgagee, in the absence of provision to the contrary, may while in possession cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament (*a*).

Conveyancing Act, 1881.

When a mortgagee in possession pending a redemption suit committed waste, he was ordered on motion to deliver up the premises to the mortgagor (*b*).

(*p*) *Richards v. Noble*, 3 Mer. 673; 17 R. R. 168; *Parrott v. Palmer*, 3 M. & K. 632; 41 R. R. 149.

(*q*) *Cuddon v. Morley*, 7 Ha. 202.

(*r*) *Commissioners of Greenwich v. Blackett*, 12 Jur. 151.

(*s*) *Farrant v. Lovell*, 3 Atk. 723; *Millett v. Davey*, 31 Beav. 470. See, however, C. A. 1881, s. 19, *infra*.

(*t*) *Godfrey v. Watson*, 3 Atk. 518; *Wragg v. Denham*, 2 Y. & C. Ex. 117; 47 R. R. 366; *Robbins*, 804.

(*u*) *Millett v. Davey*, 31 Beav. 470; Lord St. Leonards' Handy-Book, 117.

(*x*) *Norton v. Cooper*, 25 L. J. Ch. 121.

(*y*) *Thornycroft v. Crockett*, 16 Sim. 445; *Hood v. Easton*, 2 Giff. 692.

(*z*) *Rowe v. Wood*, 2 J. & W. 555; 22 R. R. 208.

(*a*) C. A. 1881, s. 19.

(*b*) *Hanson v. Derby*, 2 Vern. 392.

Chap. IV.
Sect. 3.

Waste by mort-
gagor in posses-
sion.

A first mortgagee in possession will be restrained from paying over the surplus rents to the mortgagor instead of to the second mortgagee (c).

The position of a mortgagor in possession of the mortgaged estate bears no analogy to that of a tenant for life. A mortgagor in possession is in equity the owner of the estate, and may exercise all acts of ownership and may commit waste, provided he does not diminish the security or render it insufficient (d); but if the security is insufficient he may not commit waste (e). In order that an injunction may go against a mortgagor in possession, it must appear on the affidavits that the security is insufficient, or will be rendered insufficient or scanty by the acts of waste complained of (f). The meaning of the term "insufficient" is thus explained by Wigram, V.-C., in *King v. Smith* (g):—"I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

After a decree for foreclosure *nisi*, a mortgagor in possession will be restrained from committing waste (h). In a case where the mortgagor in possession was bankrupt, but no assignees had as yet been chosen, he was restrained from committing waste (i), but in a case where he was merely in prison for debt the application for an injunction was refused (k).

After demand of possession made by the mortgagee, a trustee in bankruptcy of the mortgagor will be restrained from cutting crops and removing crops cut (l).

- | | |
|--|--|
| (c) <i>Dalmer v. Dashwood</i> , 2 Cox, | 422; <i>King v. Smith</i> , 2 Ha. 244. |
| 378, 382. | (g) 2 Ha. 244; see <i>Harper v.</i> |
| (d) <i>Kekewich v. Marker</i> , 3 | <i>Aplin</i> , 54 L. T. 383. |
| Mac. & G. p. 329. | (h) <i>Goodman v. Kine</i> , 8 B. 379. |
| (e) <i>Farrant v. Lovell</i> , 3 Atk. 723; | (i) <i>Hampton v. Hodges</i> , 8 Ves. 104. |
| <i>Humphreys v. Harrison</i> , 1 J. & W. | (k) <i>Humphreys v. Harrison</i> , 1 |
| 581; 21 R. R. 238; <i>Harper v.</i> | J. & W. 582; 21 R. R. 238. |
| <i>Aplin</i> , 54 L. T. 383. | (l) <i>Bagnall v. Villar</i> , 12 Ch. D. |
| (f) <i>Hippesley v. Spencer</i> , 5 Madd. | 812. |

A mortgagor who has sold the equity of redemption without taking any security as an indemnity against his bond cannot have an injunction against the purchaser to stay waste on the ground that the land may not be sufficient to satisfy the mortgage (*m*).

Chap. IV.
Sect. 3.
Waste by other parties.

The Court will not grant an injunction to restrain waste at the instance of a judgment creditor in an action by him against the heir and personal representative of the debtor (*n*). If a purchaser obtains possession before payment of the purchase money, he will be restrained from committing waste whereby the vendor's security would be diminished (*o*). So, also, where moneys due under a settlement are unpaid, the Court has jurisdiction to prevent any waste which may tend to injure the security (*p*).

The obligations imposed by the common law upon a tenant for life or years, or existing by the custom of the country, apply as between landlord and tenant, except in so far as they may be excluded by the terms of the agreement which subsists between the parties (*q*). Acts contrary to the obligation of a tenant to deal with the premises according to the custom of the country or express agreement are not, properly speaking, acts of waste, unless they are also breaches of the common law, but being of a like mischief with acts of waste, they are restrained upon somewhat similar principles (*r*). There is, however, a distinction in the general principles upon which the Court proceeds in restraining acts of waste done in violation of an express agreement from those on which it proceeds in restraining acts of pure waste at common law. In restraining pure waste, irrespectively of agreement, the Court proceeds

Landlord and tenant.

(*m*) See *Brumley v. Fanning*, 1 Johns. Ch. (Amer.) 500.

(*n*) *Leake v. Beckett*, 1 Y. & J. 339; 30 R. R. 794.

(*o*) *Crockford v. Alexander*, 15 Ves. 138; 10 R. R. 44; *Casamajor v. Strade*, 1 Sim. & St. 381; 39 R. R. 339; *Petley v. Eastern Counties Railway Co.*, 8 Sim. 483; Dart, 289.

(*p*) *Turkington v. Kearnan*, Ll. & G. p. 45.

(*q*) *Webb v. Plummer*, 2 B. & Ald. 746; 21 R. R. 479; *Philippe v. Smith*, 14 M. & W. 589; *Re Constable and Cranswick*, 80 L. T. 164. See ante, p. 49, as to the custom of the country.

(*r*) *Songhurst v. Dixey*, Toth. 255 *Kimpton v. Eve*, 2 V. & B. 352; 13 R. R. 116.

Chap. IV.
Sect. 3.

upon the ground of irreparable damage, and will not interfere if the damage be small (*s*). In restraining acts of waste in breach of covenants the Court proceeds upon the principle that where a positive stipulation has been entered into between two parties, either party has a right to insist upon its literal performance by the other irrespectively of the question of damage (*t*).

A termor who holds land at a ground rent is as much entitled to an injunction to stay waste by his underlessee as if he had an estate of inheritance (*u*). So, also, may a receiver have an injunction to restrain the tenants or under-tenants from committing waste (*x*).

As between landlord and tenant, no length of abuse will give the tenant a right to commit waste. The allowance of the abuse is only by the permission of the landlord, and can never be turned against him by the tenant. The rights of the tenant are only to be ascertained by the lease (*y*).

Waste by
ecclesiastical
persons.

At common law a dean and chapter, being a corporation aggregate, could alienate their estates as fully and effectually as a person seised in fee. But bishops, deans, parsons, and other corporations sole could not alienate their estates so as to bind their successors without the consent of other parties. Grants made by bishops required confirmation by the dean and chapter, those made by deans required confirmation by the bishop and chapter, and those made by parsons and vicars required confirmation by the patron and ordinary (*z*). By the restraining statutes (*a*), however, all ecclesiastical persons are disabled from alienating the possessions of the church for a longer period than twenty-one years or three lives from the making thereof (*b*). It was not enacted expressly by these

(*s*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 321, *ante*, p. 14.

(*t*) *Kemp v. Sober*, 1 Sim. N. S. 520, on appeal, 19 L. T. O. S. 308; *Tipping v. Eckersley*, 2 K. & J. 264. See *Doherty v. Allman*, 3 App. Ca. 729. See, further, as to injunctions against breaches of covenant, *post*, Chap. X.

(*u*) *Farrant v. Lovell*, 3 Atk. 72.

(*x*) *Mason v. Mason*, Fl. & K. 429.

(*y*) *Lord Courtown v. Ward*, 1 Sch. & L. 8; and see *Elias v. Griffith*, 8 C. D. 521 (C. A.).

(*z*) Phil. Eccl. Law, 1282.

(*a*) 1 Eliz. c. 19, s. 5; 13 Eliz. c. 10, s. 3.

(*b*) See also 14 Eliz. c. 11, 18 Eliz. c. 11. See, however, 20 & 21 Vict. c. 57, and 51 & 52 Vict. c. 20, which

statutes that the lessees should be made impeachable of waste (c), but it has been long decided that ecclesiastical persons are restrained by the equity of the statute 13 Eliz. c. 10, from making leases dispunishable of waste (d).

A parson being at common law able to alienate his glebe land with the consent of the proper parties, might also, with the consent of the same parties, commit waste; but without such consent a parson has not at common law any more extensive privileges as to waste in general than an ordinary tenant for life (e). It seems, however, that in some respects a parson is more favourably situated than an ordinary tenant for life or years, and that some acts which are waste in ordinary cases are not necessarily waste in his case (f).

Waste by
ecclesiastical
persons.

Timber growing on the estates of ecclesiastical persons is a fund for the benefit of the Church, and may not be felled except for the repairs of the ecclesiastical buildings, the parsonage house, the farms, and the barns and outhouses belonging to the parsonage (g). Timber growing in the churchyard may not be felled except for the necessary repairs of the chancel or the body of the church (h).

There has been some controversy whether an ecclesiastical person is bound specifically to apply the timber he has cut for the purposes of repairs towards the actual repairs for which it was wanted. From a passage in Ambler (i) it might appear that Lord Hardwicke was of opinion that a rector or vicar might cut and sell timber to any extent in order to provide a fund for general repairs; but the report of the case is too imperfect and too doubtful to give the weight of Lord Hardwicke's authority to such a proposition (k). The rule on the

statutes contain certain provisions for enabling glebe lands to be sold.

Duke of Marlborough v. St. John, 5 De G. & S. 178.

(c) Co. Litt. 44 b.

(f) *Duke of St. Alban's v. Skipwith*, 8 Beav. 355; *Bird v. Ralph*, 4 B. & Ad. 826; 2 Ad. & E. 773.

(d) *Dean and Chapter of Worcester's case*, 6 Co. Rep. 37 a; *Herring v. Dean of St. Paul's*, 3 Sw. 492; 19 R. R. 259; *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107.

(g) *Strachey v. Francis*, 2 Atk. 216; *Sowerby v. Fryer*, 8 Eq. 420.

(h) 35 Edw. 1, stat. 2; Gibbon on Dilap. 54—56.

(e) *Knight v. Moseley*, Amb. 176; *Strachey v. Francis*, 2 Atk. 216;

(i) 176.

(k) *Wither v. Dean and Chapter of*

Chap. IV.
Sect. 3.

Waste by
ecclesiastical
persons.

subject would appear to be that an ecclesiastical person may cut and sell timber for the purpose of providing other timber more suitable for the intended repairs, so long as no more is cut than is necessary for the purpose; but that he may not cut timber to defray the general expenses of his repairs (*l*).

An ecclesiastical person may continue the working of mines or gravel pits already open, and which have been lawfully opened, but he may not open new ones (*m*). Ecclesiastical persons, whether aggregate or sole, may grant leases for a long term of years for mining or other purposes with the sanction of the Ecclesiastical Commissioners (*n*). But without such sanction a parson cannot make a valid lease of mines upon his glebe, even though he has the consent of the patron and ordinary (*o*).

In the case of a parson the application for an injunction to stay waste should be made by the patron (*p*), or by the owner of the next presentation (*q*); or, if the patron is a consenting party to the waste, by the ordinary (*r*). Moreover, the Ecclesiastical Commissioners can maintain an action to restrain the working of mines in glebe lands otherwise than under a lease sanctioned by them (*s*). The right to an injunction to restrain a bishop from wasting the property of the see resides in the Attorney-General, suing on behalf of the Crown, the patron of bishoprics (*t*), and possibly to some extent in the metropolitan (*u*). So a dean and chapter may be

Winchester, 3 Mer. 421, 428; 17 R. R. 107, per Lord Eldon; *Duke of Marlborough v. St. John*, 5 De G. & S. 180, per V.-C. Parker.

(*l*) *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107; *Duke of Marlborough v. St. John*, 5 De G. & S. 181; *Sowerby v. Fryer*, 8 Eq. 417.

(*m*) *Knight v. Moseley*, Amb. 176; *Huntley v. Russell*, 13 Q. B. 591; *Ross v. Adcock*, L. R. 3 C. P. 670.

(*n*) 5 & 6 Vict. c. 108, 21 & 22 Vict. c. 57.

(*o*) *Eccl. Com. v. Wodehouse*, (1895)

1 Ch. 552; and see *Holden v. Weekes*, 1 J. & H. 283, and *Bartlett v. Philipps*, 4 D. & J. 414.

(*p*) *Knight v. Moseley*, Amb. 176; *Strachey v. Francis*, 2 Atk. 216.

(*q*) *Sowerby v. Fryer*, 8 Eq. 417.

(*r*) *Holden v. Weekes*, 1 J. & H. 285.

(*s*) *Eccl. Com. v. Wodehouse*, (1895) 1 Ch. 552.

(*t*) *Knight v. Moseley*, Amb. 176; *Wither v. Dean and Chapter of Winchester*, 3 Mer. 427; 17 R. R. 107.

(*u*) *Wither v. Dean and Chapter of Winchester*, ib.

restrained at the suit of the Crown, but not at the suit of a lessee holding under them, except in so far as he may have derived any right or interest under the agreement (x).

Chap. IV.
Sect. 4.

The Court of Chancery had no jurisdiction to interfere at the suit of a parishioner to restrain the incumbent from making alterations in the church, churchyard, or other land in his possession in right of his church (y). But it seems that the High Court may, as ancillary to the Ecclesiastical Court, grant an injunction to prevent an act in the nature of waste being committed (z). The mortgagees of a chapel and burial-ground were restrained from destroying family graves, and removing or defacing tombstones, or obliterating or defacing inscriptions thereon, in the burial-ground attached to the chapel (a). So also an injunction was granted at the suit of a bishop to restrain a corporation from disturbing a churchyard (b). The lay rector of a parish, in respect of his freehold property in the parish church and churchyard can maintain an action in the High Court against a trespasser (c). The Court will not exercise its jurisdiction to compel by mandatory injunction the restoration of a churchway at the suit of a parishioner when the Ecclesiastical Court has jurisdiction to order the restoration (d).

SECTION IV.—EQUITABLE WASTE.

THE estate of a tenant for life or years is often declared by the instrument which creates it to be "without impeachment of waste." The effect of the clause at law before the Judicature

Tenant for life
without impeachment
of waste.

(x) *Wither v. Dean and Chapter of Winchester*, 3 Mer. 421; 17 R. R. 107; *Herring v. Dean and Chapter of St. Paul's*, 3 Sw. 492; 19 R. R. 259.

(y) *Earl Fitzwilliam v. Moore*, 3 Ir. Eq. 625; *Cardinall v. Molyneux*, 4 D. F. & J. 117. See *Woodman v. Robinson*, 2 Sim. N. S. 204; *Batten v. Gedye*, 41 C. D. 507.

(z) *Marriott v. Tarpley*, 9 Sim.

279; 47 R. R. 241; *Cardinall v. Molyneux*, 4 D. F. & J. 117; Phil. Eccl. Law, 1422. But see *Batten v. Gedye*, 41 C. D. 507.

(a) *Moreland v. Richardson*, 24 Beav. 33.

(b) *B. of Durham v. Corp. of Newcastle-upon-Tyne*, 1 Set. 549.

(c) *Batten v. Gedye*, 41 C. D. 507, 516.

(d) *Ib.*

Chap. IV.
Sect. 4. — Act, 1873, s. 25, sub-s. 8, was not only to allow a tenant for life or years to commit waste, but it was a special power permitting him to appropriate the produce of the waste to his own use (e). A Court of equity, however, considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it (f').

Equitable waste.

It appears that if an owner in fee settles his estate on himself for life with remainders over, he will not be allowed any larger privileges than he would have had if the settlor had been a stranger (g).

Waste which will be restrained as being an unconscientious exercise of a legal power, is called *equitable waste*. An act may amount to equitable waste although there is a total absence of malice. "The presence or absence," said Lord Campbell, in *Turner v. Wright* (h), "of a bad motive will not enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a Court of equity by injunction can well be drawn other than the recognised and well-established line between legal and equitable waste" (i).

It is declared by the Judicature Act, 1873, s. 25, sub-s. 8, that an estate for life without impeachment of waste, shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Pulling down mansion-house or other buildings.

The case which is frequently referred to as being the leading decision on the subject of equitable waste is well known by the name of *Lord Barnard's case* (j). It is however far from being the earliest decision on the subject, as it appears to have been

(e) *Lewis Bowle's case*, 11 Co. Rep. 380. See *Vane v. Lord Barnard*, 2 81 b; *Kekewich v. Marker*, 3 Mac. Vern. 738, Prec. Ch. 454; *Barry v. Barry*, 1 J. & W. 652.

(f) *Marker v. Marker*, 9 Ha. 1, 17; *Micklethwait v. M.*, 1 D. & J. 504, 524.

(g) *Vincent v. Spicer*, 22 Beav.

(h) 2 D. F. & J. 234, 245.

(i) See *Aston v. Aston*, 1 Ves. Sen. 265.

(j) Prec. Ch. 454; 1 Salk. 161.

a well-known branch of equitable jurisdiction in the time of Lord Nottingham. In *Abraham v. Bubb* (k), we find that great judge treating it as a settled point that if a tenant for life does waste maliciously, a Court of equity will restrain him, though he had an express power to commit waste. He cited the *Bishop of Winchester's case* and *Lady Evelyn's case* as instances in his recollection in which the Court had so interposed. In several other cases about the same period the Court declared that it would restrain both tenant for life without impeachment of waste, and tenant in tail after possibility of issue extinct, from committing "wilful," "destructive," "malicious," "extravagant," or "humorsome" waste (l). These determinations led to the remarkable case of *Vane v. Lord Barnard* (m). Lord Barnard, who was tenant for life without impeachment of waste of Raby Castle under the marriage settlement of his son, with remainder to his son, in consequence of some displeasure which he had conceived against him, got workmen together and stripped the castle of the lead, iron, glass, &c., and was proceeding to pull it down, whereupon Lord Cowper granted an injunction and directed an inquiry as to the amount of damage actually done, and ordered it to be repaired at the expense of Lord Barnard. The ground upon which the doctrine was as yet founded, was said to be the destruction of the inheritance, and upon this principle Lord Hardwicke said that if a tenant for life without impeachment of waste were to pull down farm-houses he would restrain him as much as if it were the case of a mansion-house (n).

If the acts complained of are of a trivial nature the Court will not interpose. Thus Lord Hardwicke observed that if the decision in *Lord Barnard's case* could be made use of to permit a son to call his father into a Court of equity for every alteration he might make in pulling up the floor of the house, &c., it would be better for the public that Raby Castle

(k) 2 Eq. Ca. Ab. 757, Free. Ch. 63, 2 Show. 69.

(l) *Williams v. Day*, 2 Ch. Ca. 32; *Cooke v. Whaley*, 1 Eq. Ca. Ab. 400, Anon. Freem. Ch. 278.

(m) Prec. Ch. 454, 1 Salk. 161, 2 Vern. 738.

(n) 1 Ves. Sen. 265. See *Rolt v. Somerville*, 2 Eq. Ca. Ab. tit. Waste, pl. 8.

Chap. IV.
Sect. 4.

Ornamental
timber.

had been pulled down than that such a precedent should have been set (o).

The cutting of timber planted or left standing for ornament comes within the principle of equitable waste. The presumed will and intention of the settlor or deviser being the ground for the interference of the Court, the Court does not proceed upon any fancied notions of its own as to whether or not timber may be ornamental (p), but confines its protection to trees which have been planted or left standing for ornament by him (q). However ornamental in fact trees may be, they will not be protected unless they have been dedicated in some way or other by the settlor or deviser to the purposes of ornament (r). Trees, on the other hand, which have been treated as ornamental by him will be considered by the Court to be ornamental, whether they are or are not, in point of fact, ornamental. The taste of the grantor is binding upon the tenant for life, and the Court will not inquire as to what is beautiful or not. All it has to ascertain is the intention of the settlor or deviser (s). Where land is taken in exchange for settled property, timber left standing for ornament or shelter on the land taken in exchange cannot be cut down by the tenant for life (t).

Trees which have been planted or left standing for the purpose of excluding objects from view (u), or for the purpose of shelter and protection to a mansion-house (x), are regarded as ornamental timber. In *Coffin v. Coffin* (y), Lord Eldon refused that part of the order for an injunction which had been granted by the Vice-Chancellor, restraining a man from cutting trees which protected the premises from the

(o) *Piers v. Piers*, 1 Ves. Sen. 521.

(p) *Marker v. Marker*, 9 Ha. 1, 17.

(q) *Marker v. Marker*, 9 Ha. 1, 17;
Ford v. Tynte, 2 D. J. & S. 127.

(r) *Ib.*; *Williams v. Mucnamara*,
8 Ves. 70; *Halliwell v. Philipps*, 4
Jur. N. S. 607.

(s) *Wombwell v. Bellasyse*, 6 Ves.
110, n; *Marquis of Downshire v.*
Sandys, ib. 110; *Ford v. Tynte*,
2 D. J. & S. 127.

(t) *Ashby v. Hicks*, 58 L. T. 557.

(u) *Day v. Merry*, 16 Ves. 375;
10 R. R. 200; *Campbell v. Allgood*,
17 Beav. 627.

(x) *Chamberlayne v. Dummer*, 1
Bro. C. C. 166, 3 ib. 549; *Tamworth*
v. Lord Ferrers, 6 Ves. 419; *Mar-*
quis of Downshire v. Sandys, ib. 107;
Coffin v. Coffin, Jac. 71; 23 R. R. 1.
Campbell v. Allgood, 17 Beav. 626.

(y) Jac. 71.

effects of the sea. The reasons of his lordship are not given, and it is difficult to see why that part of the order was refused.

Chap. IV.
Sect. 4.

It has been said that the protection of the Court is confined to trees of a purely ornamental character, and that trees which have been planted for profit as well as for ornament will not be protected (*z*); but this statement seems too wide (*a*).

The Court has often much difficulty in determining whether trees have been planted or left standing for ornament. The question in all cases of the sort is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact (*b*). The existence of a mansion-house will in many cases supply the Court with evidence on which to determine the point as to the ornamental character of timber, for trees when in the neighbourhood of a mansion-house will be assumed to have been planted for ornament (*c*).

It is not, however, necessary that timber should be contiguous to a house or park in order to entitle it to the protection of the Court as being ornamental (*d*).

The Court has greater difficulty in determining that trees have been left standing or preserved for ornament, than in determining that trees have been planted for ornament; but the leaving trees standing beyond the usual and provident period of cutting, the clearing out of trees and surrounding them by pleasure walks and seats, and other circumstances, from which an inference arises that the settlor or devisor regarded the trees with other views than as mere subjects of profit, may be considered as *prima facie* evidence that trees were left standing for shelter or ornament (*e*). It is doubtful whether the Court can ever go back beyond the time of an

Ornamental
timber.

(*z*) *Halliwell v. Philipps*, 4 Jur. N. S. 608; and see *Micklethwait v. Micklethwait*, 1 D. & J. 527.

(*a*) See *Bedoyère v. Nugent*, 25 L. R. Ir. 143; *Ford v. Tynte*, 2 D. J. & S. 127, 133.

(*b*) 9 Ha. 17.

(*c*) *Micklethwait v. Micklethwait*,

1 D. & J. 504, 526.

(*d*) See *Marquis of Downshire v. Sandys*, 6 Ves. 110; and *Wombwell v. Bellasyse*, 6 Ves. 110, n.

(*e*) *Lushington v. Boldero*, 6 Madd. 149; 22 R. R. 261. See *Halliwell v. Philipps*, 4 Jur. N. S. 607.

Chap. IV.
Sect. 4.

absolute owner of the estate for the purpose of ascertaining whether timber is to be treated as ornamental (*f*).

Although the Court will, as a general rule, abstain from exercising a judgment upon matters of taste, yet where a deed of settlement provided that enough of the most ornamental timber should always remain to leave the beauty of the place unimpaired, and the deed evidently referred to the state of the property at the time of its execution as the standard of beauty, the Court directed an inquiry whether certain trees could be cut without impairing the beauty of the place as it stood at the date of the settlement (*g*). “Although there will be, no doubt,” said L. J. Turner (*h*), “great difficulty in executing a trust or enforcing an injunction to preserve the property according to a certain standard of beauty, the difficulty is not such as it is beyond the power of the Court to grapple with.”

The question what a prudent owner would do in the proper and ordinary course of management of his property, is not the measure of the obligation which attaches in a Court of equity upon a tenant for life without impeachment of waste with reference to timber planted or left standing for ornament. But if there be evidence to show that a wood planted or left standing for ornament had been resorted to by the absolute owner for the supply of timber for repairs or sale, a tenant for life without impeachment of waste may do the same, provided he acts as a prudent owner in a due course of management would do (*i*).

Thinning of
trees.

In — *v. Copley* (*k*), where the defendant by his answer stated that he had cut down trees for the improvement of the estate, Lord Erskine granted an injunction against cutting down ornamental timber and trees planted in the situations of others cut down, but without prejudice to the thinning of trees for the sake of ornament (*l*). So also if a tempest has produced gaps in a piece of ornamental planting by which

(*f*) *Micklethwait v. M.*, 1 D. & J. 127.
504, 513.

(*g*) *Marker v. M.*, 9 Ha. 1.

(*h*) *Ib.* 18.

(*i*) *Ford v. Tynte*, 2 D. J. & S.

(*k*) 3 Madd. 525 n. See *Barry v. Barry*, 1 J. & W. 654.

(*l*) See s. 28, sub-s. (2) of the Settled Land Act, 1882.

unequal and discordant marks and divisions were occasioned, the Court will not restrain the cutting a few trees, so as to produce a uniform and consistent appearance (m).

Chap. IV.
Sect. 4.

The cutting of saplings or young trees, not fit for the purposes of timber, comes within the principle of equitable waste. The mere fact, however, that trees are being felled of younger growth than would be felled by a prudent owner in the course of a husbandlike management of the estate, is not enough to induce the Court to interfere with the legal power of a tenant for life without impeachment of waste. To come within the principle of equitable waste, a case of spoliation or destruction must be made out (n). In *Hole v. Thomas* (o), Lord Eldon considered the cutting saplings and timber trees at unseasonable times to be a malicious destruction, and granted an injunction (p).

Young trees and saplings.

The cutting of underwood of an insufficient growth or at unseasonable times comes also within the principle of equitable waste, when it amounts to a destruction or spoliation of the property (q); and generally, it would appear that the principle of equitable waste extends to any act which amounts to malicious waste, and goes to the wanton destruction and spoliation of the property (r).

Underwood, &c., &c.

If the tenant for life be expressly bound to keep certain buildings in repair, this qualifies the gift to him without impeachment of waste. The estate for life "without impeachment of waste" is sometimes qualified by the clause "except voluntary waste," or words to that effect. This was the case in *Garth v. Cotton* (s). In his judgment Lord Hardwicke said

Tenancy for life without impeachment may be qualified.

(m) See *Lord Mahon v. Lord Stanhope*, 3 Madd. 523 n.

(n) *O'Brien v. O'Brien*, Amb. 107; *Packington's case*, 3 Atk. 216; *Aston v. Aston*, 1 Ves. 265; *Lady Strathmore v. Bowes*, 2 Bro. C. C. 188; 1 R. R. 76; *Smythe v. Smythe*, 2 Sw. 252; 19 R. R. 72; *Lord Tamworth v. Ferrers*, 6 Ves. 419; *Halliwell v. Phillips*, 4 Jur. N. S. 608.

(o) 7 Ves. 589.

(p) See *Chamberlayne v. Dummer*,

1 Bro. C. C. 166, 3 ib. 549; *Seton*, 550; *Pentland v. Somerville*, 2 Ir. Ch. 289.

(q) *Hole v. Thomas*, 7 Ves. 589; 6 R. R. 195; *Brydges v. Stephens*, 6 Madd. 279; 23 R. R. 217; 2 Sw. 150 n.; *Dunn v. Bryan*, I. R. 7 Eq. 143.

(r) See *Aston v. Aston*, 1 Ves. Sen. 264; *Bishop of London v. Webb*, 1 P. Wms. 527.

(s) 3 Atk. 751, 1 Ves. 546, 1 Dick. 188.

Chap. IV.
Sect. 4.

incidentally that timber could not be cut, but no relief was sought in that case against the tenant for life. In *Vincent v. Spicer* (t), Lord Romilly, M. R., considered the words "voluntary or permissive waste" qualifying an estate for life without impeachment of waste, as merely tantamount to "spoil and destroy," and held that the tenant for life or his assignee were entitled to cut such timber and other trees not planted or standing for ornament, as an owner of an estate in fee, having due regard to his present interest, and to the permanent advantage of the estate, might properly cut in a due course of management.

Trustees of a term "without impeachment of waste."

The terms "without impeachment of waste" as applied to trustees of a term for special purposes, have a different sense from that of the same words annexed to a tenancy for life. Trustees of a term without impeachment of waste are bound to a more provident execution of their powers than a tenant for life, and must act in their trust as the Court itself would act (u).

Term with impeachment of waste.

It probably makes no difference whether the estate which is made unimpeachable of waste is freehold or a long term of years, determinable on the death of the lessee for life (x). But it seems that if a long term of years be declared at its creation to be unimpeachable of waste, and be afterwards settled on one for life, with remainder over, although the tenant for life is not expressly declared to be unimpeachable of waste, he will be so treated as between himself and those claiming the rest of the term (y).

Limitation to tenant for life without impeachment of waste made subject to trustee for a term.

The limitation to a tenant for life without impeachment of waste is sometimes made by the settlement subject to a power in trustees for a term to enter and cut timber. In a case where a discretionary power to this effect was vested in trustees for a term, the Court protected them in the exercise of their power, there being an absence of all *mala fides*, or of any wanton or

(t) 22 Beav. 380.

(u) *Marquis of Downshire v. Sandys*, 6 Ves. 107, 114.

(x) *Garth v. Cotton*, 3 Atk. 751, 1 Ves. Sen. 524, 546, 1 Dick. 183.

(y) *Bridges v. Stephens*, 2 Sw. 150 n.; 23 R. R. 217. See *Lord Downshire v. Sandys*, 6 Ves. 107; *Craig on Trees*, 50.

unreasonable exercise of their discretion (z). So also where the limitation to a tenant for life without impeachment of waste was subject to the power in trustees with the consent of the tenant for life, to cut timber for the purpose of paying off a mortgage debt, the Court, upon the construction of the settlement, restrained the tenant for life from cutting timber for his own benefit (a).

A tenant for life without impeachment of waste will not be permitted to gain any undue advantage from the exercise of a power or trust for sale or exchange of the settled estates. Thus in *Lady Plymouth v. Archer* (b), lands were devised upon trust for sale, the produce to be invested in other lands to be purchased and to be to the use of Lord Archer for life without impeachment of waste, with remainders over, and there was a declaration that the rents and profits of the lands, until sold, were to be to the use of the person entitled to the estate to be purchased. Lord Archer was held not entitled to cut timber on the lands devised, because, as he would have a right to cut timber on the estate to be bought, that would be giving him double timber. In a case, *Burgess v. Lamb* (c), before Lord Eldon, trustees for the purchase of real estate were made successively tenants for life without impeachment of waste of the estate to be purchased. An estate having been purchased with a disproportionate quantity of timber upon it, the question was whether the monies had been properly laid out, and whether an injunction could be sustained against the first tenant for life in cutting timber. This question Lord Eldon would not decide, the frame of the record not being such as to bring it properly before him; but he said that if the timber bore a very considerable proportion to the value of the whole purchase, the tenant for life, who was one of the trustees, could not be permitted to cut it (d).

Tenant for life without impeachment of waste may not gain any undue advantage from the exercise of a power of sale or exchange or purchase.

A tenant for life in remainder without impeachment of waste, may not commit waste before his own estate has fallen into

Waste by collusion.

(z) *Kekewich v. Marker*, 3 Mac. & G. 311.

(b) 1 Bro. C. C. 159.

(c) 16 Ves. 174.

(a) *Briggs v. Earl of Oxford*, 5 De G. & Sm. 156.

(d) See *Craig on Trees*, 60—72.

Chap. IV.
Sect. 4.

possession by leave of a tenant for life in possession who is impeachable for waste (*e*). So also the Court will interfere by injunction if the tenant for life and the remainderman in fee, subject to contingent estates, are committing waste in collusion (*f*), or where waste is being committed by a tenant for life in possession, who has the next vested estate of inheritance in remainder, but subject to intermediate contingent estates (*g*).

Estate for life
under executory
trust.

Judicature Act,
1873, s. 25,
sub-s. 3.

Where a settlement is directed to be executed for the purpose of carrying out an executory trust, the estate of the tenant for life will not as a rule be made dispunishable for waste (*h*); but it is otherwise in cases where the trust is executed by cutting down words of inheritance to an estate for life in the first taker (*i*).

Timber cut
under order of
the Court.

The Court will order ornamental timber, or timber which forms a shelter or defence to a mansion-house to be felled, where it is decaying or injurious to adjoining trees, or where it is necessary for the well-being, salubrity, and comfort of the mansion-house that it should be cut, or where any other sufficient reason can be shown why it should be cut (*k*). A tenant for life without impeachment of waste who commits equitable waste will not be allowed to derive any benefit therefrom (*l*); unless it appear that the timber so cut by him is such as the Court would upon a proper application have directed to be cut for the preservation and improvement of the remaining ornamental timber, in which case he will be allowed to retain the proceeds of sale of the same (*m*).

(*e*) *Lady Evelyn's case*, cited 2 Freem. 55, 2 Sw. 172, & Dick. 209; *Fleming v. Bishop of Carlisle*, cited Dick. 209.

(*f*) *Garth v. Cotton*, 1 Dick. 183, 1 Ves. 524, 548, 3 Atk. 751.

(*g*) *Williams v. Duke of Bolton*, 1 Cox, 72; 4 R. R. 21; *Birch Wolfe v. Wolfe*, 9 Eq. 683.

(*h*) *Davenport v. Davenport*, 1 H. & M. 775; *Stanley v. Coulthurst*, 10 Eq. 259.

(*i*) *Ib.* See *Bankes v. Le Despencer*,

10 Sim. 576, 11 Sim. 508.

(*k*) See *Campbell v. Allgood*, 17 B. 623; *A.-G. v. D. of Marlborough*, 5 Madd. 280; 18 R. R. 273; *Lushington v. Boldero*, 6 Madd. 149; 22 R. R. 261.

(*l*) *Lushington v. Boldero*, 15 B. 1, 7; *Wellesley v. W.*, 6 Sim. 497; 38 R. R. 161.

(*m*) But as to the right of the remainderman to require the cutting to be done under the supervision of the Court, see *infra*.

SECTION V.—INTEREST AND PROPERTY IN SEVERED TIMBER,
ETC.—ACCOUNT.

Though a tenant for life unimpeachable for waste will be allowed to keep the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber, it does not follow that the Court will not, at the instance of the remainderman, grant an injunction to restrain the tenant for life from cutting ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. The remainderman has a right to the protection of the Court to prevent the tenant for life from cutting it improperly (*n*).

Chap. IV.
Sect. 5.

Right of
remainderman
to require
cutting to be
done under
supervision
of Court.

In one case (*o*), an injunction was granted to restrain a person who had committed waste by cutting down timber, from carrying the timber away: but it seems doubtful whether this is sound law, though perhaps, in a very exceptional case, an injunction might be granted on the ground of irreparable mischief. An injunction might, however, it appears be granted to restrain the carrying away of timber standing at the time of process served (*p*).

The produce of mines, the opening of which is waste, belongs, as in the case of timber, to the owner of the first estate of inheritance (*q*), but compensation money paid by a railway company for minerals which might possibly have been gotten by a tenant for life *sans* waste belongs to him (*r*).

Property in
severed minerals.

In all cases in which an action for an injunction will lie to restrain future waste, a Court of equity will, upon the principle of preventing a multiplicity of suits, give an account of past waste (*s*), but where from the determination of the estate of

Account.

(*n*) *Baker v. Sebright*, 13 C. D. 179. ever, see *post*, p. 80.

(*o*) *Anon.*, 1 Ves. Jr. 92.

(*r*) *Re Barrington, Gamlen v.*

(*p*) *Watson v. Hunter*, 5 Johns.

Lyon, 33 C. D. 523.

Ch. (Amer.) 168.

(*s*) *Jesus College v. Bloom*, 3 Atk.

(*q*) *Bell v. Wilson*, 1 Ch. 303. As to the effect of the S. L. Act, how-

263, Amb. 54; *Parrott v. Palmer*, 3 M. & K. 632; 41 R. R. 149.

the wrongdoer, or some other reason, there is nothing on which the injunction can operate, and complete relief can be had in damages, an action for an account will not, as a general rule, lie (*t*). In a case where a tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste, although an injunction and account were granted against the existing tenant for life, it was yet held that, as no injunction could be granted against the preceding tenant for life, an account could not be ordered against her executrix for waste committed by the preceding tenant for life (*u*). But if the waste were of such a nature, that there was no remedy at law, and a wrong would be sustained, if equity did not interfere, an action for an account would lie, although an injunction might not be competent. Thus in *Garth v. Cotton* (*x*), a decree for an account of timber was made against the assets of a remainderman in fee, who had colluded with the tenant for life in cutting timber before the birth of a contingent remainderman. So, also, in cases of equitable waste, an action for an account will lie against the assets of a deceased wrong-doer, though an injunction is not competent (*y*). So, also, a clerk after recovery in *quare impedit*, is entitled to an account for waste (*z*).

Mines and collieries, being a species of trade, an account of profits will in all cases be granted, without reference to the question whether or not an injunction will lie, or whether or not there is a remedy at law (*a*).

An action for an injunction by the patron of a living to stay waste by an incumbent, or by the Attorney-General to stay

(*t*) *Jesus College v. Bloom*, 3 Atk. 263, Amb. 54; *Grierson v. Eyre*, 9 Ves. 346; *Parrott v. Palmer*, 3 M. & K. 632; 44 R. R. 149.

(*u*) *Higginbotham v. Hawkins*, 7 Ch. 676.

(*x*) 3 Atk. 751; 1 Ves. 524, 546; 1 Dick. 183.

(*y*) *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Madd. 116; 15 R. R. 225; *Duke of Leeds v. Lord Amherst*, 2 Ph. 117; *Morris*

v. Morris, 3 D. & J. 323; *Blake v. Peters*, 1 D. J. & S. 345. Cf. *Phillips v. Homfray*, (1892) 1 Ch. 465, 471.

(*z*) *Crompton v. Bishop of Meath*, Sa. & Sc. 297.

(*a*) *Jesus College v. Bloom*, 3 Atk. 263, Amb. 54; *Thomas v. Oakley*, 18 Ves. 184; 11 R. R. 181; *Parrott v. Palmer*, 3 M. & K. 642; 41 R. R. 149. Comp. *Elias v. Griffith*, 8 Ch. D. 521.

waste by a bishop, should not pray for an account of the profits for their own benefit as patrons (b).

Chap. IV.
Sect. 5.

If one co-owner of land derives gain by committing destructive waste on the common property, he is liable to account to the other owners for their shares of the money so obtained (c). The tenant in common of a mine is accordingly entitled to an account of the monies produced by working the mine (d). But in taking the account the tenant in common who works the mine is allowed to deduct from the value of the minerals in account with his co-tenants the cost of severance and bringing the minerals to the pit's mouth (e). A tenant in common in occupation of an estate is not liable to account for waste in cutting timber which falls short of destructive waste (f).

Account
between tenants
in common.

The account is limited to the monies actually received and the profits actually made by the wrongdoer. There can be no account in respect of acts unattended by profit (g). When, accordingly, equitable waste had been committed by a tenant for life without impeachment of waste in pulling down a mansion-house, and building a new house with the materials of the old one on another part of the estate, but it did not appear that any profit had been derived from the sale of the materials, the Court held that an account could not be had against the assets of the deceased tenant for life. The case would have been otherwise, if he had sold the materials and received the profits (h). So also a tenant for life will not be charged with sums produced by technical acts of waste which have improved the land (e.g., by cutting and selling turf) (i). Credit also will be given in taking the account for the application of the

Account limited
to monies
actually
received.

(b) *Knight v. Moseley*, Amb. 176.

(c) Co. Litt. 200 b; *Martyn v. Knowlys*, 8 T. R. 145. See *Twort v. Twort*, 16 Ves. 128; 10 R. R. 141.

(d) See *Bentley v. Bates*, 4 Y. & C. 182. See, also, *Clegg v. Clegg*, 3 Giff. 322.

(e) *Job v. Potton*, 20 Eq. 84, 97. See *Phillips v. Homfray*, 6 Ch. 770, which, however, was not a case of tenants in common.

(f) *Griffies v. Griffies*, 8 L. T. 758; 11 W. R. 943.

(g) *Lee v. Alston*, 1 Ves. Jr. 78, 1 Bro. C. C. 194, 3 Bro. C. C. 37; *Colburn v. Simms*, 2 Ha. 560; *Powell v. Aiken*, 4 K. & J. 343, 351, ante, p. 28.

(h) *Morris v. Morris*, 3 D. & J. 323.

(i) *Harris v. Ekins*, 20 W. R. 999; 26 L. T. 827.

Chap. IV.
Sect. 5.

proceeds of waste by the tenant for life in permanent improvements (k).

If a case for account be made out, the law will not inquire whether or not the act complained of was a sound exercise of discretion.

Remainderman for life.

Damages for equitable waste.

Statute of Limitations.

Delay.

If a case for account be made out, the Court cannot inquire whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs (l).

A mesne remainderman for life, although entitled to an injunction to protect his enjoyment, has no interest to call for an account (m).

When ornamental timber has been felled and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damage can only be measured by the damage done to the inheritance (n).

It seems that in all cases of waste, whether legal or equitable (o), time begins to run under the Statute of Limitations as soon as the waste is committed; and the statute applicable being 21 Jac. 1, c. 16, the claim will (in the absence of disability or acknowledgment) be barred at the end of six years (p).

If, however, there has been long delay in bringing the action, the Court will usually endeavour to deal liberally with the estate of the deceased tenant for life, inasmuch as, in many cases, it would not be for the benefit of the parties concerned to go into a long and expensive inquiry on the subject (q).

(k) *Birch Wolfe v. Birch*, 9 Eq. 683.

(l) *Duke of Leeds v. Lord Amherst*, 2 Ph. 117.

(m) *Pigot v. Bullock*, 1 Ves. Jr. 479; 3 Bro. C. C. 538. See *Gent v. Harrison*, John. 524.

(n) *Bubb v. Yelverton*, 10 Eq. 465.

(o) See, however, *The Duke of Leeds v. Amherst*, 2 Ph. 117; *Dashwood v. Magniac*, (1891) 3 Ch. 387. See these cases discussed, Hewitt on Limitations, 24, 25.

(p) *Seagram v. Knight*, 2 Ch. 628,

632; *Higginbotham v. Hawkins*, 7 Ch. 676; and see *Birch Wolfe v. B.*, 9 Eq. 683, 692; *Simpson v. S.*, 3 L. R. Ir. 308.

(q) *Bagot v. Bagot*, 32 Beav. 509, 519. But see *Duke of Leeds v. Lord Amherst*, 20 Beav. 239. See, also, *Bagot v. Bagot*, 32 Beav. 509, 521, 522, as to accounts and inquiries in a case of waste, both in timber and mines, presenting a great complication of circumstances. See also, *Tooker v. Annesley*, 5 Sim. 235; 2 Set. 1751, for the form of inquiry as to timber.

Actions for an injunction to stay waste should not be brought to a hearing when no account is sought, or the account is waived, and the defendant does not dispute the right of the plaintiff to have the injunction continued, or offers to submit to the injunction with costs (r). Chap. IV.
Sect. 6.
Perpetual
injunction.
Costs.

SECTION VI.—CERTAIN STATUTORY ENACTMENTS AFFECTING THE
LAW IN REGARD TO WASTE.

The statements made in the previous pages of this chapter in regard to the law of waste, must be read as modified by various recent statutes.

For example, under the *Settled Estates Act*, 1877 (s), the Court may authorise leases of any settled estate, or of any rights or privileges over or affecting any settled estate for any purpose, whether involving waste or not, subject to the conditions therein mentioned (t).

Under this Act, the Court may also authorise timber (other than ornamental timber) growing on a settled estate to be sold (u), and may authorise part of the settled estate to be laid out for streets, roads, and other works (x).

Under the *Settled Land Act*, 1882, a tenant for life may, without any leave of the Court (*inter alia*), grant building or mining leases (y), and in the latter case, whether the mines be already opened or not (z). But unless a contrary intention is expressed in the settlement, part of the rent, in the case of a mining lease, is to be set aside as capital; namely, where the tenant for life is impeachable for waste three-fourths, otherwise one-fourth (a).

In connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the benefit of the residents on the settled land, may cause any part of the land

(r) *Harvey v. Ferguson*, 15 Ir. Ch. 277; *Dunsany v. Dunne*, ib., 279, ante, p. 29.

(s) 40 & 41 Vict. c. 18.

(t) Section 4.

(u) Section 16.

(x) Section 20.

(y) Section 6. See *In re Aldam's Settled Estate*, (1902) 2 Ch. 46 (C. A.).

(z) Section 2, sub-s. 10 (iv.).

(a) Section 11.

Chap. IV.
Sect. 6.

to be laid out for streets, roads, squares, gardens, or other open spaces (b). The Act also authorises capital money to be expended in various improvements on the settled land (c), and the tenant for life and persons employed by him may enter on the settled land, and without impeachment of waste execute any improvement authorised by the Act, or inspect and repair the same, and for the purposes thereof may (*inter alia*) get and work limestone and other substances, and may cut and use timber not left standing for shelter or ornament (d).

Section 35 provides that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell such timber. Three-fourths of the net proceeds of sale are to be set aside as capital, and the remaining fourth to go as rents and profits.

The *Agricultural Holdings Act*, 1883, provides (e) that where after the commencement of the Act a tenant affixes to his holding any fixture, or erects any building, for which he is not under the Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before, or within a reasonable time after the termination of the tenancy.

58 & 59 Vict. c. 27 extends the provisions of the *Agricultural Holdings Act*, 1883, in the case of market gardens, and enables the tenant to recover compensation for (*inter alia*) the erection or enlargement of buildings for the purposes of the trade of a market gardener, whether made with the landlord's consent or not. The provisions of the Act of 1883 have been further extended by the *Agricultural Holdings Act*, 1900.

(b) Section 16.

(d) Section 29.

(c) Sections 25, 26, and 21 (iii.),
and sect. 13 of S. L. Act, 1890.

(e) Section 34.

CHAPTER V.

INJUNCTIONS AGAINST TRESPASS.

THE jurisdiction of a Court of equity to grant injunctions against trespass is comparatively of modern establishment (a). Chap. V.
Jurisdiction.

The Court for a long time confined relief in equity to waste, founding its interference on the privity of title between the parties (b). The rigour of the old rule in confining relief in equity to waste, was relaxed for the first time by Lord Thurlow in a case where, the party complaining being in possession of a close, a wrongdoer was working into his minerals, and taking away the very substance of his estate (c). In relaxing the rule Lord Thurlow acted with reluctance, and was influenced solely by the irreparable and destructive injury which would have followed the refusal (d). The principle established by Lord Thurlow in *Flamang's case* was approved by Lord Eldon, and followed by him in some cases, but the law on the subject was left by him in an unsatisfactory state. Succeeding judges have, on more than one occasion, pointed this out, and have felt much difficulty in finding the principle upon which to act in each case as it arose.

The state of the law, and the various authorities, were reviewed with much care by Kindersley, V.-C., in *Lowndes v. Bettle* (e), who classified the cases under two heads: the one, where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession and is asking the Court to protect his estate.

(a) 3 Ra. Ca. 355.

7 Ves. 308, 8 Ves. 90, 18 Ves. 186.

(b) *Davenport v. Davenport*, 7 Ha.

(d) 7 Ves. 308; 18 Ves. 186;

217; *Lowndes v. Bettle*, 33 L. J. Ch. 451.

Talbot v. Hope Scott, 4 K. & J. p. 122.

(c) *Flamang's case*, cit. 6 Ves. 147,

(e) 33 L. J. Ch. 451.

Chap. V.

In what cases
an injunction
would be
granted against
trespass.

The result of the cases (apart from the alteration made by the Judicature Act, 1873) was that where the plaintiff was *out of possession* the Court would refuse to interfere by granting an injunction unless there was fraud or collusion, or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate (*f*). Where the plaintiff was *in possession* and the defendant was a *mere trespasser* not claiming under colour of right, the tendency of the Court was not to grant an injunction, in the absence of special circumstances, but to leave the plaintiff to his remedy at law; although an injunction would be granted if the acts complained of tended to the destruction of the estate. But where the plaintiff was in possession and the defendant *claimed under an adverse title*, the tendency was to grant the injunction (*g*).

Judicature Act,
1873, s. 25,
sub-s. 8.

The distinction, however, which has been taken between the cases where the defendant committing the acts of trespass or spoliation complained of is or is not in possession, and claims under colour of title, or is a mere stranger, is not now of the same importance; for by sect. 25, sub-sect. 8 of the Judicature Act, 1873, it is provided that:—

“ . . . if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable.”

Lowndes v.
Bettle.

In *Lowndes v. Bettle* (*h*), the plaintiff and his ancestors had been in possession of an estate for eighty years, and the

(*f*) See *Talbot v. Hope Scott*, 4 L. J. Ch. 451, 457.
K. & J. 108; *Neale v. Cripps*, ib. (*h*) 33 L. J. Ch. 451. See also
472, and the other cases cited by *Stanford v. Hurlstone*, 9 Ch. 119;
Kindersley, V.-C., in *Lowndes v. Allen v. Martin*, 20 Eq. 467; *Ardley*
Bettle, 33 L. J. Ch. 451. See also *v. Guardians of St. Pancras*, 39
Stanford v. Hurlstone, 9 Ch. 116. L. J. Ch. 871; *Att.-Gen. v. Tomline*,
(*g*) See *Lowndes v. Bettle*, 33 5 C. D. 750.

defendant, claiming as heir at law, entered upon it, and exercised acts of ownership by cutting sods and felling timber, with the view, as he alleged, of prosecuting his claim as heir under the direction of the Court. Kindersley, V.-C., considering that irremediable damage might result in the event of his refusing to interfere, granted an interim injunction, and afterwards made the injunction perpetual.

If the trespass did not amount to destructive trespass, but was a case of mere ordinary naked trespass, the Court of Chancery would not, under the old procedure, interfere by way of injunction (i). Thus, where a claimant to property had been non-suited in ejectment, the Court refused to restrain him from vexatiously distraining on or otherwise molesting the tenants (k). So, also, where the owner of house property filed a bill for an injunction against a defendant who had been his lessee, but had forfeited his lease, to restrain him from distraining on the tenants, a demurrer for want of equity was allowed (l).

But under the Judicature Act, 1873, s. 25, sub-s. 8, an injunction may be had to restrain a landlord from exercising his legal right of distress. In *Shaw v. Lord Jersey* (m), an injunction was granted to restrain a landlord from distraining for rent until the determination of an action brought by tenants against him to try his right to the rent on the terms that the injunction should be granted for a fortnight, and continued only on the payment of the rent in the meantime into Court.

So also the Court may now restrain a trespass by injunction in cases where there has been no destructive trespass. A lessor accordingly, who, in the absence of a power to enter upon the demised premises to repair them on breach of the lessee's covenant to repair, entered for the purpose of executing repairs, was restrained by injunction, even though under a

(i) *Garstin v. Asplin*, 1 Madd. 152; *Jackson v. Stanhope*, 15 L. J. Ch. 446; *Cooper v. Crabtree*, 20 C. D. 592. but see *Hodgson v. Duce*, 2 Jur. N. S. 1014.

(l) *Aldis v. Fraser*, 15 Beav. 220. (m) 4 C. P. D. 359, *ante*, p. 23.

(k) *Best v. Drake*, 11 Ha. 369;

Chap. V.

superior lease the lessor was liable to forfeiture for non-repair, and though he entered by leave of a weekly tenant (*n*).

Cutting turf was not, under the old procedure, such a destructive trespass, as the Court would, except under very special circumstances, restrain by injunction (*o*).

Principles on which the Court acts in restraining trespass.

The jurisdiction of the Court by injunction in cases of trespass is in aid of the legal right. If the right at law is clear, and the breach clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed with what he is doing or threatens to do, an injunction will be granted pending the trial of the right (*p*). But if the right at law is not clear, or the breach is doubtful, and no irreparable injury can arise to the plaintiff pending the trial of the right, the case resolves itself into a question of comparative convenience (*q*).

A continuing trespass.

In the case of a trespass of a continuing nature, the Court will generally interfere by injunction (*r*); and the Court will (at all events since the Judicature Act, 1873) interfere by injunction where the trespass, although not of a continuing nature, is threatened to be repeated (*s*).

If the act complained of consists in the erection of works or buildings on the land of the plaintiff, an injunction may be had as long as the works or buildings are in an incomplete state; but if the works or buildings have been completed before action the Court will generally leave the plaintiff to his remedy in damages (*t*). If, however, the conduct of the defendant has been fraudulent, vexatious, or oppressive, and

(*n*) *Stocker v. Planet Building Society*, 27 W. R. 877.

(*o*) *Sandys v. Murray*, 1 Ir. Eq. 29; *Wrixon v. Condran*, ib. 380.

(*p*) See *Clowes v. Beck*, 13 Beav. 347; *Lowndes v. Bettie*, 33 L. J. Ch. 451; *Allen v. Martin*, 20 Eq. 466.

(*q*) *Ante*, pp. 20, 21.

(*r*) *Goodson v. Richardson*, 9 Ch. 221, 227; *Allen v. Martin*, 20 Eq. 465; *Ardley v. Guardians of St. Pancras*, 39 L. J. Ch. 871; *Eardley v. Lord Granville*, 3 C. D. 826; and

see the judgments in *Battersea Vestry v. County of London and Brush, &c., Co.*, (1899) 1 Ch. 474 (C. A.).

(*s*) *Harrison v. D. of Rutland*, (1893) 1 Q. B. p. 154; *Hickman v. Maisey*, (1900) 1 Q. B. 752; and as to when an intended repetition will be inferred, see *Phillips v. Thomas*, 62 L. T. 793; *Dunlop Pneumatic Tyre Co. v. Neal*, (1899) 1 Ch. 807.

(*t*) See *Deere v. Guest*, 1 M. & C. 516; *Moreland v. Richardson*, 22 Beav. p. 604.

the trespass is of so serious a nature that the parties cannot be placed in the position in which they were before the acts of trespass were committed, without the interference of the Court, the Court will interpose, even though the act complained of has been completed (*u*).

An action for trespass committed or intended is not maintainable against the Crown, or against any officials of the Crown or Government sued in their official capacity or as an official body (*x*).

Trespass by
Crown.

The principles upon which the Court acts in restraining trespass on the part of companies or bodies having compulsory powers to take or enter lands, differ in some respects from those upon which it acts in restraining trespass by individuals. A private person who applies for an injunction to restrain a public company or body from entering illegally on his land, is not required to make out a case of destructive trespass or irreparable damage. The inability of private persons to contend with these powerful bodies raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers, and prevent them from deviating from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the statute. The principle upon which the Court interferes in such cases is not so much the nature of the trespass as the necessity of keeping such bodies within control (*y*). It is incumbent on them to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt

Trespass by
public companies
or public bodies.

(*u*) See *ante*, p. 32; and see *Frewin v. Lewis*, 4 M. & C. 249, 254; 48 R. R. 88; *Pinchin v. Marriott v. Reid*, 82 L. T. 369.

(*x*) *Ruleigh v. Goschen*, (1898) 1 *London and Blackwall Railway Co.*, Ch. 73, 78, 79. 5 D. M. & G. p. 860; *Sutton v. Mayor, &c., of Norwich*, 27 L. J.

(*y*) *Kemp v. London and Brighton Railway Co.*, 1 Ra. Ca. 495, 504; Ch. pp. 741, 742.

Chap. V.

must be for the benefit of the landowner, and should not be solved in a manner to give to the company any power that is not clearly and expressly defined in the statute (z). The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by stirring out of the exact limits prescribed by the statute which gives them authority, but will, as a matter of course, interfere (a), unless no injury has arisen or is likely to arise, or unless the injury, if any has arisen, is so small as to be hardly capable of being appreciated by damages (b), or unless the remedy by damages is adequate and sufficient, or is, under the circumstances of the case, the proper remedy (c), or unless the trespass is one merely of a temporary nature (d). In a case where a company acting *bonâ fide* had taken possession of property by mistake, and the question at issue between the company and the landowner was only a question of value, the Court would not interfere, there being no evidence to show any culpable negligence on the part of the company (e). Lord Romilly, M. R., thought himself justified in taking into consideration in such a case the inconvenience which the public would be exposed to from granting the injunction (f).

Injunction
against a com-
pany continuing
in possession.

If a company is in possession under a title acquired through the apparent owner of the property, the Court will not in general, at the suit of a person alleging an adverse title, interfere to restrain the company from continuing in possession (g); but if land has been taken by a company improperly, or if the

(z) *Simpson v. South Staffordshire Railway Co.*, 34 L. J. Ch. 380, 387.

(a) See *River Dun Navigation Co. v. North Midland Railway Co.*, 1 R. Ca. p. 154; *Att.-Gen. v. Mid-Kent, &c., Railway Co.*, 3 Ch. 100, 104; and see also, *Att.-Gen. v. London and North Western Railway Co.*, (1900) 1 Q. B. 78 (C. A.).

(b) *Warden of Dover Harbour v. South Eastern Railway Co.*, 9 Ha. p. 493; *Ware v. Regent's Canal Co.*, 3 D. & J. 212, 229; *Wandsworth Board of Works v. London and South Western Railway Co.*, 31

L. J. Ch. 854; *Dowling v. Pontypool, &c., Railway Co.*, 18 Eq. 714.

(c) *Turner v. Blamire*, 1 Drew. 402.

(d) *Standish v. Mayor of Liverpool*, 1 Drew. 1. See 8 Vict. c. 20, ss. 32—42, as to the powers given to railway companies to take temporary possession of lands abutting on the intended railway for certain purposes.

(e) *Wood v. Charing Cross Railway Co.*, 33 Beav. 290.

(f) *Ib.*; *sed quare*.

(g) *Webster v. South Eastern Railway Co.*, 1 Sim. N. S. 272.

conduct of the company has been vexatious, unreasonable, or oppressive, the Court may restrain them from continuing in possession until a proper compensation has been made (*h*).

If the act complained of affects the public interest, the remedy is by an action in the nature of an information at the suit of the Attorney-General (*i*). A local authority may act as relators in an action brought by the Attorney-General (*k*). But a private person may sue alone, even although the act complained of may affect the public interest, if he can make out a case of special damage or can show that greater damage is caused to him thereby than is caused to the King's subjects in general (*l*). There may in such cases be both an information and an action (*m*). Where, indeed, an Act of Parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action, without either joining the Attorney-General as a party, or showing that he has sustained any particular damage (*n*). Where an illegal act is being committed, which in its nature tends to the injury of the public (such as an interference with a public highway or a navigable river) the Attorney-General on behalf of the public can maintain an action for an injunction without adducing evidence of actual injury to the public (*o*).

(*h*) *Perks v. Wycombe Railway Co.*, 3 Giff. 662, 673; *Lord Nelson v. Salisbury and Dorset Railway Co.*, W. N. (1868) 180; *Stretton v. Great Western, &c., Railway Co.*, 5 Ch. 751.

(*i*) *Thorne v. Taw Vale Railway Co.*, 13 Beav. 10; *Vestry of Bermondsey v. Brown*, 1 Eq. 204, 215; *Wallasey Local Board v. Gracey*, 36 C. D. 593, 56 L. J. Ch. 739; *Tottenham District Council v. Williamson and Sons, Ltd.*, (1896) 2 Q. B. 353 (C. A.); *Stoke Parish Council v. Price*, (1899) 2 Ch. 277.

(*k*) *Att.-Gen. v. Logan*, (1891) 2 Q. B. 100; and see *Stoke Parish Council v. Price*, (1899) 2 Ch. 277.

(*l*) *Cook v. Mayor, &c., of Bath*,

6 Eq. 177; *Winterbottom v. Lord Derby*, 36 L. J. Exch. 194; *Wallasey Local Board v. Gracey*, 36 C. D. 593, 56 L. J. Ch. 739.

(*m*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Att.-Gen. v. United Kingdom Telegraph Co.*, 30 Beav. 287.

(*n*) *Mayor, &c., of Devonport v. Plymouth, &c., Tramways Co.*, 52 L. T. 161.

(*o*) *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 C. D. 752; *London Assoc. of Shipowners v. London and Tilbury Docks Joint Committee*, (1892) 3 Ch. p. 270; *Att.-Gen. v. London and North Western Railway Co.*, (1899) 1 Q. B. 72; (1900) 1 Q. B. 78.

Chap. V.

In spite of the view expressed by Lord Eldon in *Agar's case* (*p*), it seems to be now established that a landowner cannot maintain a suit to restrain a company from exercising their compulsory powers over his land on the ground either of the resources of the company being insufficient for the completion of the undertaking, or of a material variation being made or intended to be made in the construction of the works; *unless* the plaintiff can prove to the satisfaction of the Court that he will suffer actual and material prejudice by the company's failure to complete the undertaking, or by the proposed variation, as the case may be (*q*).

Persons empowered by statute to take lands may take what they shall deem necessary, so long as there is *bona fides*.

Where persons are empowered by the legislature to take lands compulsorily for the purposes of an undertaking, they are the proper judges of what land they need (*r*). They may take as much land as they deem necessary for the proper construction of the works which they are authorised to make, and of the works incidental to the main purpose of the undertaking, provided they act *bonâ fide*; but they may be restrained from exercising those powers for any purpose of a collateral kind, that is, for any purposes except those for which the legislature has invested them with extraordinary powers (*s*). An injunction will, accordingly, be granted to restrain a company which has power to take land from taking the same for the purposes of another company which has not power to take the land (*t*).

(*p*) *Coop.* 77; 14 R. R. 217; cited 1 Sw. 250; and see *Blakemore v. Glamorganshire Railway Co.*, 1 My. & K. 154, 164; 36 R. R. 289.

(*q*) See *Holyoake v. Shrewsbury and Birmingham Railway Co.*, 5 Ra. Ca. 421; *Wintlev. Bristol and South Wales Union Railway Co.*, 10 W. R. 210; *Lee v. Milner*, 2 Y. & C. Ex. 611; 47 R. R. 463; *Salmon v. Randall*, 3 M. & C. 439, 445; 45 R. R. 306; *Ware v. Regent's Canal Co.*, 3 D. & J. 217, 228.

(*r*) *Stockton and Darlington Railway Co. v. Brown*, 9 H. L. C. p. 256; *Lewis v. Weston-super-Mare Local Board*, 40 C. D. 55, 62.

(*s*) *Webb v. Manchester and Leeds*

Railway Co., 4 M. & C. 116; 48 R. R. 28; *Stockton and Darlington Railway Co. v. Brown*, 9 H. L. C. 256; *Simpson v. South Staffordshire Waterworks Co.*, 4 D. J. & S. 689; *Galloway v. Mayor, &c., of London*, 1 L. R. H. L. p. 43; *Lewis v. Weston-super-Mare Local Board*, 40 C. D. 55, 62; *James v. Lovel*, 35 W. R. 628; *Stroud v. Wandsworth District Board of Works*, (1894) 1 Q. B. p. 68; *Comp. Rolls v. School Board of London*, 27 C. D. 644.

(*t*) *Wood v. Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731; *Vane v. Cuckermouth and Darlington Railway Co.*, 13 W. R. 1015.

Although a company, having power to take land, may not take it for the purpose of another company which has not power to take it, a company which has legally taken land, may enter into an agreement with another company for the joint use of it. The arrangement between the companies does not vitiate the title which the company has acquired to the land (*u*). If there is evidence to show that a company is taking land which is not *bonâ fide* required for the proper purposes of the undertaking, it is not enough that the engineer of the company may have made an affidavit that the land is or would be wanted for the purposes of the undertaking. The purposes must be specified so that the Court may judge whether the land is *bonâ fide* required (*x*). But the moment the Court is satisfied with the *bona fides* and honesty of the engineer, that is sufficient (*y*). The burden of proving want of *bona fides* rests upon the party opposing the purchase (*z*). If there is no ground to suspect *mala fides*, the Court will give credit to the testimony of the engineer as to the quantity of land required for the purposes of the undertaking, or as to what would be a proper execution of the works (*a*). If there is more than one way of making the works which the company is authorised to make, and if the company are acting *bonâ fide*, the company by their engineer are the sole judges of the way to be adopted (*b*). Whether land is necessary for the purposes of the undertaking is a question of fact for a jury (*c*). But everything which is reasonably required for the purpose of completing the undertaking which the company are authorised to make, such, for instance, as land for accommodation works, &c., is land required for the purposes of the undertaking (*d*).

(*u*) *Wood v. Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731.

(*x*) *Flower v. London, Brighton, and South Coast Railway Co.*, 2 Dr. & Sm. 330; *Kemp v. South Eastern Railway Co.*, 7 Ch. 364, 375.

(*y*) *Wilkinson v. Hull, &c., Railway and Dock Co.*, 20 C. D. 323 (C. A.).

(*z*) *Errington v. Metropolitan Dis-*

trict Railway Co., 19 C. D. 559, 571 (C. A.).

(*a*) *Selby v. Colne Valley, &c., Railway Co.*, 10 W. R. 661.

(*b*) *Wilkinson v. Hull, &c., Railway and Dock Co.*, 20 C. D. 323 (C. A.).

(*c*) *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526.

(*d*) *Wilkinson v. Hull, &c., Railway and Dock Co.*, 20 C. D. 323 (C. A.).

Chap. V.

Where the legislature has conceded powers to a company for a certain purpose (*e.g.*, the formation of a railway), such a company must not, in order to effect its objects, exceed the limits of its powers. But where an existing public body, such as the corporation of a city, is entrusted by the legislature with the duty of making public improvements, the powers thus entrusted to it will not be subject to a strict and restrictive construction (*e*).

Lands Clauses
Act and Railway
Clauses Act.

The Lands Clauses Consolidation Act (*f*) is usually incorporated with all Acts giving companies power to take land. Where the company is a railway company, the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, as well as the Lands Clauses Act, is generally incorporated with the special Act in all cases where the special Act has been obtained since the enactment of the two general Acts. These Acts, however, do not interfere with private contracts. They were intended only to apply where the parties have omitted, or are unable to determine their rights by agreement, and will not be allowed to override or control the provisions of a deed deliberately executed for the purpose of determining the rights of parties and in which they are not referred to (*g*).

All companies incorporating these two Acts with their own special Act are bound to adhere strictly to the powers of taking land prescribed by these Acts, and to proceed only in the mode and with the formalities required by them. The attempt to take or enter upon lands otherwise than in accordance with the mode pointed out by these Acts, except in so far as they may be modified by the special Act incorporating the company, is a trespass, and will be restrained by injunction (*h*).

- (*e*) *Galloway v. Mayor, &c., of London*, 1 L. R. H. L. 34; *Rolls v. School Board of London*, 27 C. D. 639, 643; *Lewis v. Weston-super-Mare Local Board*, 40 C. D. 55, 62; *Stroud v. Wandsworth District Board of Works*, (1894) 1 Q. B. p. 68; and see *Hill v. Wallasey Local Board*, (1894) 1 Ch. 133 (C. A.); but see *Att.-Gen. v. L. C. C.*, (1901) 1 Ch. p. 788.
(*f*) 8 & 9 Vict. c. 18.
(*g*) *Sanderson v. Cockermouth and Workington Railway Co.*, 19 L. J. Ch. 503; *Clarke v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 1 J. & H. 631.
(*h*) *Fooks v. Wilts, Somerset, and*

By the 18th clause a company, before taking or entering upon lands which they are authorised to take, must serve upon the landowner or persons interested therein, or enabled by the Act to sell and convey the same, a notice to treat, specifying the land which they require (i). Notice to treat must be served on the tenants who have an interest in the land (k), every lessee and sub-lessee being entitled to a separate notice (l). But notice to treat need not be served upon tenants who hold on quarterly or other short tenancies, if the company acquires the reversion and gives notice to quit terminating before it enters upon the land (m). If the lands are in the possession of a receiver, or of the committee of a lunatic appointed by the Court of Chancery the company should make a special application to the Court. If they proceed, without the sanction of the Court, to enforce the statutory powers, an injunction may be obtained to restrain them (n).

Chap. V.
Clause 18,
notice to treat.

The notice to treat should state accurately the quantity and situation of the land required (o). A plan is generally annexed to the notice to treat. If any mistake is made on the face of the plan, the company will be unable to enter upon any land which may be omitted (p). Notice that land is wanted for the purposes of a railway is sufficient; and accordingly the

Weymouth Railway Co., 5 Ha. 199;
Stone v. Commercial Railway Co.,
4 M. & C. 122; 48 R. R. 32; *Schwinge*
v. London and Blackwall Railway
Co., 3 Sm. & G. 30.

(i) See *Martin v. London, Chatham, and Dover Railway Co.*, 1 Ch. 301; *Stretton v. Great Western, &c., Railway Co.*, 5 Ch. 751; *Dowling v. Pontypool, &c., &c., Railway Co.*, 18 Eq. 714; *Protheroe v. Tottenham and Forest Gate Railway Co.*, (1891) 3 Ch. 278 (C. A.).

(k) *Rogers v. Dock Company at Hull*, 34 L. J. Ch. 165.

(l) *Abrahams v. Mayor, &c., of London*, 6 Eq. 625.

(m) *Syer v. Metropolitan Board of Works*, 36 L. T. 277; *Ex p. Nadin*, 17 L. J. Ch. 421; *Reg. v. Poulter*, 20 Q. B. D. 132.

(n) *Re Taylor*, 6 Ra. Ca. 741; *Tink v. Rundle*, 10 Beav. 318; *Richards v. Richards*, John. 255.

(o) *Stone v. Commercial Railway Co.*, 4 M. & C. 122; 48 R. R. 32.

(p) *Kemp v. London, Brighton, &c., Railway Co.*, 1 Ra. Ca. 495. See, however, as to the correction of mistakes in the plans and books of reference of a railway company, 8 Vict. c. 20, s. 7; *Kemp v. West End, &c., Railway Co.*, 1 K. & J. 689.

Chap. V.

notice need not state that the land is wanted for the purposes of a station (q).

A company is not bound to comprise the whole of the land, which they may require, in the first notice, but may from time to time, until the compulsory powers expire, serve fresh notices to the same landowner for taking any additional land which may be requisite for the works (r).

Effect of notice to treat.

After notice to treat once given neither party can get rid of the obligation. The relative situation of vendor and purchaser is to a certain extent, and for certain purposes, created by giving the notice (s). The landowner to whom the notice is given (t), and the company giving the notice, are equally bound (u). The notice cannot be recalled or varied without the consent of the landowner (x), "if he insists upon holding them to it; but it is otherwise if the landowner for any reason either chooses to allow them to withdraw the notice or admits that it is informal or bad in any way" (y). It is no answer in general to say that there are no funds to go on with the undertaking (z). But commissioners acting on behalf of the Executive Government may recede from a notice to treat, on the ground of a deficiency of funds (a). Notice to treat will

(q) *Wood v. Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731.

(r) *Stamps v. Birmingham and Stour Valley Railway Co.*, 2 Ph. 673; *Simpson v. Lancaster Railway Co.*, 15 Sim. 580; *Kemp v. South Eastern Railway Co.*, 7 Ch. 365. See 26 & 27 Vict. c. 92, s. 8.

(s) *Marquis of Salisbury v. Great Northern Railway Co.*, 17 Q. B. 840; *Adams v. London and Blackwall Railway Co.*, 2 Mac. & G. 118; *Haynes v. Haynes*, 1 Dr. & Sm. 426, 450; *Tiverton and North Devon Railway Co. v. Loosemore*, 9 App. Ca. 488, 503.

(t) *Metropolitan Railway Co. v. Wodehouse*, 34 L. J. Ch. 297; *Bristol, &c., Railway Co. v. Somer-*

set, &c., Railway Co., 22 W. R. 399.

(u) *Sparrow v. Oxford, Worcester, and Wolverhampton Railway Co.*, 9 Ha. 436.

(x) *Tawney v. Lynn and Ely Railway Co.*, 4 Ba. Ca. 619, 16 L. J. Ch. 282.

(y) *Ashton Vale Iron Co., Ltd. v. Mayor, &c., of Bristol*, (1901) 1 Ch. p. 599, *per Romer*, L.J.

(z) *Rex v. Hungerford Market Co.*, 4 B. & Ad. 327; *Birch v. Vestry of Marylebone*, 17 W. R. 1014; *Reg. v. Commissioners of Woods and Forests*, 15 Q. B. 773.

(a) *Steele v. Mayor, &c., of Liverpool*, 14 W. R. 311; *Reg. v. Commissioners of Woods and Forests*, 15 Q. B. 773.

be considered as abandoned if there is great delay in proceeding under it (b). But the mere fact that nothing is done till after the expiration of the Act will not invalidate a notice to treat. When the notice to treat is met by a counter notice, under the 92nd clause of the Act, requiring the company to take the whole of the property, the company may recede from the notice and refuse to take any part (c), and the company may afterwards, if they wish, serve a fresh notice in respect of the same land, or any part thereof, and upon that being validly withdrawn may serve a third notice, and so on during the time limited by their special Act for the exercise of compulsory powers (d). Where a landowner has waived the service of notice, he cannot take an objection for want of it (e).

Inasmuch as the Act applies only to corporeal hereditaments, the 18th clause does not apply to easements (f). It is not necessary to serve the owner of a mere easement, as a way-leave, over the property (g). Easements may, however, come within the Act when taken in connection with the special Act (h).

There has been much difference of opinion whether, after the service of notice to treat, the landowner and the company are brought within the ordinary jurisdiction of the Court as to the specific performance of contracts. After an elaborate

(b) *Hedges v. Metropolitan Railway Co.*, 28 Beav. 109. See *Richmond v. North London Railway Co.*, 3 Ch. 679; *Ystalyfera Iron Co. v. Neath and Brecon Railway Co.*, 17 Eq. 150.

(c) *Reg. v. London and South Western Railway Co.*, 12 Q. B. 775, 7 Ra. Ca. 669; *King v. Wycombe Railway Co.*, 28 Beav. 104; *Grierson v. Cheshire Lines Committee*, 19 Eq. 83.

(d) *Ashton Vale Iron Co., Ltd. v. Mayor, &c., of Bristol*, (1901) 1 Ch. 591 (C. A.).

(e) *Rex v. South Holland Drainage*, 8 A. & E. 429; *Tower v. Eastern Counties Railway Co.*, 3 Ra. Ca. 374;

Lynch v. Commissioners of Sewers, 32 C. D. 72 (C. A.).

(f) *Pinchin v. London and Blackwall Railway Co.*, 5 D. M. & G. 862.

(g) *Thicknesse v. Lancashire Canal Co.*, 4 M. & W. 472; 51 R. R. 692. But when an existing easement is interfered with, compensation may be obtained by the owner of the dominant tenement under sect. 68; see *Clark v. School Board for London*, 9 Ch. 120; *Kirby v. School Board for Harrogate*, (1896) 1 Ch. 442.

(h) *Great Western Railway Co. v. Swindon, &c., Railway Co.*, 9 App. Ca. 810; *Hill v. Midland Railway Co.*, 21 C. D. 143.

Chap. V.

review of all the authorities, Kindersley, V.-C., held that, though to a certain extent and for certain purposes the notice to treat places the parties in the relation of vendor and purchaser, and involves some of the consequences which flow from actual contract, it does not amount to a contract which a Court of Equity will enforce upon a bill for specific performance, even when filed by a landowner against the company, still less that it constitutes a contract by the landowner to sell his land (i). But a notice to treat, followed by the subsequent fixing by arbitration of the purchase and compensation money, does create an enforceable contract (k).

Clause 84.

By the 84th clause the promoters of an undertaking are forbidden from taking possession of lands until after payment of the purchase monies in the mode prescribed in the Act, provided always that they may, upon a certain notice therein specified, enter upon lands for the purpose of surveying the ground or setting out the line. The making a tunnel under a highway, without disturbing the surface, is an entry upon land within the clause (l). A company will be restrained by injunction from entering upon land until the monies awarded have been paid or deposited, as required by the clause (m). When a company enter upon land for the purposes of making a survey without giving the notice required by the clause, they may be restrained (n).

Clause 85.

By the 85th clause, where a company is desirous of taking possession before any agreement has been entered into, award made or verdict given, it is authorised to do so upon payment into the bank of the sum claimed by any party, who shall not consent, or such as shall be determined by a surveyor, appointed by two justices, to be the value of the property, and giving a bond with two sureties for payment of the purchase

(i) *Haynes v. Haynes*, 1 Dr. & Sm. 426, 444.

(k) *Mason v. Stokes Bay Pier and Railway Co.*, 32 L. J. Ch. 110; *Harding v. Metropolitan Railway Co.*, 7 Ch. 154.

(l) *Ramsden v. Manchester, &c., Railway Co.*, 1 Exch. 723, 5 Ra. Ca.

552.

(m) *Lee v. Milner*, 2 Y. & C. 617; 47 R. R. 463; *Birmingham and District Land Co. v. London and North Western Railway Co.*, 40 C. D. 268 (C. A.).

(n) See *Fooks v. Wilts, Somerset, and Weymouth Railway Co.*, 5 Ha. 199, 4 Ra. Ca. 210.

monies and compensation to be ascertained under the provisions of the Act. It is incumbent on those who seek to avail themselves of the provisions of the clause to show clearly and satisfactorily that they have fulfilled its conditions and complied with its requisitions (*o*).

Money paid into Court under this clause only stands as a security for such sum as may be found upon inquiry to be the value of the interest taken (*p*). Where there has been a special contract with respect to the purchase of land, the provisions of the clause do not apply. By the contract the matter is withdrawn from the operation of the Act; and accordingly in such case the company cannot enter upon land under the provisions of the clause on payment of the money into the bank (*q*).

Where a landowner refuses to allow a company to enter upon land on which they are entitled to enter under sect. 85, but does not actually resist their entry, they are justified in entering peaceably without calling on the sheriff under sect. 91, to give possession (*r*).

Clause 85 applies only to lands taken, and not to lands injuriously affected by the works (*s*).

Possession should not be taken by a company until a settlement has been come to with all parties interested. The taking possession after a settlement with the tenants in possession only is erroneous, and contrary to the provisions of the Act (*t*). In cases of the sort, the Court will usually, on the motion for an injunction, order it to stand over upon the terms of the company undertaking to lodge the money, and giving the usual bond under this section of the Act (*u*).

Clause 85 does not apply to lands injuriously affected.

Possession taken on agreement with tenants only.

(*o*) *Barker v. North Staffordshire Railway Co.*, 2 De G. & S. 55, 5 Ba. Ca. 401; *Field v. Carnarvon and Llanberis Railway Co.*, 5 Eq. 190.

(*p*) *Martin v. London, Chatham, and Dover Railway Co.*, 1 Ch. p. 505.

(*q*) *Newton v. Metropolitan Railway Co.*, 1 Dr. & Sm. 583, 592.

(*r*) *Loosemore v. Tiverton and North Devon Railway Co.*, 22 C. D. 41.

(*s*) *Hutton v. London and South*

Western Railway Co., 7 Ha. 262; *Lister v. Lobley*, 7 A. & E. 124.

(*t*) *Inge v. Birmingham, Wolverhampton, and Stour Valley Railway Co.*, 3 D. M. & G. 666; *Martin v. London, Chatham, and Dover Railway Co.*, 1 Ch. 501.

(*u*) *Alston v. Eastern Counties Railway Co.*, 1 Jur. N. S. 1009; *Carter v. Great Eastern Railway Co.*, 9 Jur. N. S. 618.

Chap. V.

Parties who have taken possession regularly cannot be treated as trespassers.

Persons who take lands which they are authorised to take, with the consent of owners or occupiers, cannot afterwards be treated as trespassers (*x*). Where a railway company had complied with the provisions of the clause, and had entered and taken land within the prescribed period for exercising the compulsory powers, their continuance in possession after the prescribed period without having the compensation assessed and the land conveyed to them, is not unlawful (*y*).

Compensation.

The remedy of landowners whose property is injuriously affected by the erection of buildings under the authority of the Metropolitan Local Management and Streets Improvement Acts is by claiming compensation under the Lands Clauses Act, s. 68, and not by injunction (*z*).

Clause 92.

Company cannot insist upon taking part of a house.

By the 92nd clause it is enacted that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building, or manufactory, if such party be willing and able to sell and convey the whole thereof." Owners under disability may avail themselves of the provisions of the clause (*a*). The clause applies, although the landowner has only a leasehold interest (*b*), and holds the property in question under different demises (*c*); but the option of the lessee does not affect the owner of the fee (*d*). An owner who has been served with notice by a company to take part of his premises may, under the clause, refuse to sell less than the whole thereof: but he cannot by reason of such notice require that the whole be taken. The company may, on his refusal to sell less than the

(*x*) *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526; *Knapp v. London, Chatham, and Dover Railway Co.*, 2 H. & C. 212.

(*y*) *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526.

(*z*) *Wigram v. Fryer*, 36 C. D. 87. The same rule applies where a landowner's property is injuriously affected by a school board under the powers of the Elementary Education Act, 1870. See *Clark*

v. London School Board, 9 Ch. 120; *Kirby v. Harrogate School Board*, (1896) 1 Ch. 437 (C. A.).

(*a*) *St. Thomas's Hospital v. Charing Cross Railway Co.*, 1 J. & H. 400.

(*b*) *Pulling v. London, Chatham, and Dover Railway Co.*, 3 D. J. & S. 661.

(*c*) *Macgregor v. Metropolitan Railway Co.*, 14 L. T. 354.

(*d*) 3 D. J. & S. p. 667.

whole, abandon their notice, and refuse to take any part (e). If the counter notice comprises any land which the company is not bound to take, the company may disregard it (f). The acceptance by the solicitor of a company of a counter notice to take land which the company cannot be compelled to take, is not binding on the company (g). The giving a counter notice under the clause, creates an equity against the landowner, whether the original notice be valid or not. In such a case the Court will not in general interfere by injunction, even where the company serves a new notice after its compulsory powers have expired; except upon terms putting the landowner to sell and convey the property which he has, by his counter notice, offered to sell (h). A landowner who does not give the counter notice requiring the company to take the whole of his premises, until after the refusal of the company to give him what he asked for the part comprised in the notice, is not precluded from availing himself of the provisions of the clause (i). Where a company is required by the landowner to take the whole of his premises, under the provisions of the clause, the amount to be secured by deposit and bond, under sect. 85, before taking possession, is the value of the whole of the premises, and not of the portion actually required by the company (k). But if the company is not bound to take the land which it is required by the counter notice to take, the amount to be secured by deposit is the value of the premises specified in the notice to treat (l). The provisions of the clause apply, although the land may not fall within the limits of deviation (m).

(e) *Reg. v. London and South Western Railway Co.*, 12 Q. B. 775; *King v. Wycombe Railway Co.*, 28 Beav. 104.

(f) *Loosemore v. Tiverton and North Devon Railway Co.*, 22 C.D. 35.

(g) *Treadwell v. London and South Western Railway Co.*, 54 L.J.Ch. 565, W.N. (1884) 233.

(h) *Pinchin v. London and Blackwall Railway Co.*, 5 D.M. & G. 851, 865.

(i) *Gardner v. Charing Cross Railway Co.*, 2 J. & H. 248.

(k) *Giles v. London, Chatham, and Dover Railway Co.*, 1 Dr. & Sm. 406; *Dadson v. East Kent Railway Co.*, 7 Jur. N. S. 941.

(l) *Harvie v. South Devon Railway Co.*, 23 W.B. 202, W.N. (1874) 218

(m) *St. Thomas's Hospital v. Charing Cross Railway Co.*, 1 J. & H. 400.

Chap. V.

It is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a house or a building or a manufactory (*n*).

"House."

The word "house" in the clause means all that would pass under the grant of a house in a conveyance, and will include the curtilage and garden, and all that is necessary to the enjoyment of the house (*o*). A house is not the less a house because it is a public-house or an inn; nor is it the less a house because it comprises or is used for the purpose of a shop, or because it comprises or is used for the purpose of a workshop or storehouse (*p*). The word, however, includes only what is necessary for the convenient use and occupation of the house, and not also what is subsidiary to, or necessary for, the convenience of the occupant of the house (*q*).

"Manufactory."

What is a "manufactory" within the meaning of the clause is in each case a question of fact. The word has been inserted in the clause to provide for the case of a manufacture being carried on in premises where there is no house or buildings, but there is a manufactory in the sense of its being appropriate for the carrying on of what may be called a manufacture (*r*). A manufactory may be a house or a building, or may be something more; it may be more than one house or more than one building (*s*), or it may consist of neither house nor building, but only of land used for a purpose of manufacture (*t*).

114th clause.
Interest of
mortgagees.

Under the 114th clause, if a mortgagee is required to accept payment of his mortgage money at a time earlier than the

(*n*) *Richards v. Swansea Improvement, &c., Co.*, 9 C. D. 425.

(*o*) *Grosvenor v. Hampstead Junction Railway Co.*, 1 D. & J. 446, 454; *St. Thomas's Hospital v. Charing Cross Railway Co.*, 1 J. & H. 400, 404; *King v. Wycombe Railway Co.*, 28 Beav. 104; *Salter v. Metropolitan Railway Co.*, 9 Eq. 432; *Barnes v. Southsea Railway Co.*, 27 C. D. 536; *Low v. Staines Reservoir Committee*, 16 T. L. R. 184 (C. A.).

(*p*) *Richards v. Swansea Improvement and Tramway Co.*, 9 C. D. 432, per James, L. J.

(*q*) *Steele v. Midland Railway Co.*, 1 Ch. 275.

(*r*) *Richards v. Swansea Improvement and Tramways Co.*, 9 C. D. 437, per Cotton, L. J.

(*s*) See *Brook v. Manchester, Sheffield, and Lincolnshire Railway Co.*, (1895) 2 Ch. 571.

(*t*) 9 C. D. 437.

time limited by the mortgage deed, he is entitled to compensation in respect of the loss to be sustained by him by reason of his mortgage money being prematurely paid off. Where a company had taken possession without providing for such compensation an injunction was granted (*u*).

Chap. V.

Where the occupier of lands is a tenant at will, or from year to year, his interest is to be assessed summarily before two magistrates, and upon payment of the amount he must deliver up possession (*x*). If any lessee, on being required to do so, does not produce his lease or grant, or give the best evidence thereof, he may be treated as a tenant from year to year, and be dealt with accordingly (*y*).

121st and 122nd clauses.

Tenancy at will, and from year to year.

Where an application is made to justices under sect. 21 to determine the compensation to be paid to a person claiming to be interested as yearly tenant, the justices have no jurisdiction to inquire into the title of the claimant to his alleged interest; but they are bound to inquire whether the claimant has been required to give up possession before the expiration of his term or interest, as it is a condition precedent to the right to compensation that the claimant should have been so required (*z*).

Section 21 does not apply to a person who produces a lease which, though void at law, is equivalent in equity to a lease for a greater interest than a yearly tenancy (*a*).

Unless otherwise provided for in the special Act, the powers for the compulsory purchase or taking of lands are not to be exercised after the expiration of three years from the passing of the special Act (*b*).

123rd clause.

Term for compulsory purchase.

If the notice to take lands has been given within the period prescribed by the clause, it is immaterial that the purchase

Notice served before expiration of prescribed period.

(*u*) *Ranken v. East and West India Dock Co.*, 12 B. 298.

way Co. v. Tillett, (1902) 1 K. B. 874.

(*z*) Section 121. See *Reg. v. Great Northern Railway Co.*, 2 Q. B. D. 151; *Syer v. Metropolitan Board of Works*, 36 L. T. N. S. 277, W. N. (1876) 305, W. N. (1877) 41.

(*a*) *Sweetman v. Metropolitan Railway Co.*, 1 H. & M. 543.

(*y*) Section 122.

(*b*) Section 123. See *Sparrow v. Oxford, Worcester, and Wolverhampton Railway Co.*, 9 H. 444; *Seymour v. London and South Western Railway Co.*, 33 L. T. 380.

(*z*) *Great Northern and City Rail-*

Chap. V.

has not been completed before the time limited by the clause. The landowner or the company may take the proper steps to ascertain the price notwithstanding that the prescribed period has gone by (c). So also if a company give notice to take land and enter on the land after taking the steps required by sect. 85 before the expiration of the period prescribed for the exercise of the powers of compulsory purchase, they may continue to hold the land after the expiration of that period (d). Where there has been a lawful entry under sect. 85, the promoters of a company may use the land though the time for the exercise of the powers given by the Act have elapsed. There is nothing in the Lands Clauses Act which engrafts on the absolute power of entry on giving security for the value of the land given by the 85th clause a qualification that possession must be taken not only within the time prescribed by the special Act, but also so long before its expiration that the works may be made on the land within the time named in the special Act (e). The only step open to the landowner is to have compensation assessed as provided by the Act (f).

A company which has given notice to treat within the prescribed period and has taken the steps required by sect. 85, may enter after the time for the exercise of compulsory powers has expired. "The power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase" (g).

Effect of delay.

Mere delay on the part of the promoters after service of the notice does not raise any equity, because the landowner has a remedy by mandamus, compelling the promoters to proceed (h). But if notice be given by a company immediately before the

(c) *Reg. v. Birmingham and Oxford Junction Railway Co.*, 15 Q. B. 634; *Yatalyfera Iron Co. v. Neath and Brecon Railway Co.*, 17 Eq. 146.

(d) *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526.

(e) *Tiverton and North Devon Railway Co. v. Loosemore*, 9 App. Ca. 488; *Elmsley v. North Eastern Railway Co.*, (1896) 1 Ch. 418.

(f) *Ib.*

(g) *Marquis of Salisbury v. Great Northern Railway Co.*, 17 Q. B. 840, 853; *Tiverton and North Devon Railway Co. v. Loosemore*, 9 A. C. p. 488.

(h) *Reg. v. Birmingham and Oxford Junction Railway Co.*, 15 Q. B. 634; *Pinchin v. London and Blackwall Railway Co.*, 5 D. M. & G. 864.

Chap. V.

expiration of their compulsory powers, and there is great delay in completing the purchase, and the conduct of the promoters is such as to lead the landowner into the belief that the undertaking has been abandoned, an injunction may be obtained to prevent the company proceeding with the purchase (i).

By the 124th clause provision is made for the purchase by promoters of companies of interests in lands, the purchase of which has been omitted by mistake (k). 124th clause. Lands omitted by mistake.

By clause 128 the right of pre-emption of superfluous lands, which have been taken by the promoters of an undertaking, is given in the first place to the person entitled to the land from which the same have been originally severed, and in the next place to the person whose lands immediately adjoin such superfluous lands. The right of pre-emption extends to lessees for years of such adjoining lands; and an injunction will be granted to enforce the right (l). 8 & 9 Vict. c. 18, s. 128. Superfluous lands.

Where the undertaking is a railway company, the special Act usually enacts that it shall be lawful for the promoters of the undertaking to make and maintain the railway and works in the line and upon the land delineated in the plans and described in the books of reference, and to enter upon and take, and use such of the said land as shall be necessary for such purpose. Special Act authorising the construction of a railway.

Plans deposited in compliance with the standing orders prior to the introduction of a bill into Parliament do not form any part of the Act, except in so far as they may have been incorporated within its provisions; nor can they be otherwise referred to for the construction of the Act (m). The plans Plans deposited in compliance with standing orders.

(i) *Hedges v. Metropolitan Railway Co.*, 28 Beav. 109. But see *Yaldyfera Iron Co. v. Neath and Brecon Railway Co.*, 17 Eq. 148; *Tiverton and North Devon Railway Co. v. Loosemore*, 9 App. Ca. 489.

(k) See *Marquis of Salisbury v. Great Northern Railway Co.*, 5 C. B. N. S. 174; *Jolly v. Wimbledon and Dorking Railway Co.*, 1 B. & S. 821;

Stretton v. Great Western Railway Co., 5 Ch. 760.

(l) *Coventry v. London, Brighton, &c., Railway Co.*, 5 Eq. 104.

(m) *North British Railway Co. v. Todd*, 12 Cl. & Fin. 732; *Beardmer v. London and North Western Railway Co.*, 1 Mac. & G. 112, 1 H. & Tw. 161, 5 Ba. Ca. 728.

Chap. V.

are only binding to the extent of determining the datum line and the line of railway measured with reference to that datum line, but not with reference to the surface levels, unless the Act incorporates them within its provision (n). The particular works intended to be made need not appear on the deposited plan. It is enough that the land required shall be within the limits of deviation (o).

Railway
Clauses Act.
Limits of
deviation.

By the Railways Clauses Consolidation Act, 8 Vict. c. 20, ss. 11—15, a railway company may deviate a hundred yards from the datum line. The expression "deviation" is to be taken with reference to the line of railway only: that is, the line of railway actually laid down shall not deviate more than a hundred yards from the line delineated in the Parliamentary plans, the *medium filum* of each being the commencement and termination in measuring the hundred yards (p).

Deviation in
respect of a
tunnel or
viaduct.
8 Vict. c. 20,
s. 13.

When a viaduct or tunnel was marked on the plans deposited as intended to be made, no deviation could, under the Railways Clauses Consolidation Act, 8 Vict. c. 20, s. 13, be made except with the consent of the landowner. It was necessary that the work, if made, should be made accordingly (q). But under 26 & 27 Vict. c. 92, s. 4, a railway company in the construction of the line may deviate from the line or level of any arch, tunnel, or viaduct described on the deposited plans or sections, so as the deviation be made within the limits of deviation shown on the plans, and so as the nature of the work described be not altered; and may also, with the consent of the Board

26 & 27 Vict.
c. 92, s. 4.

(n) *North British Railway Co. v. Todd*, 12 Cl. & Fin. 722; *Wure v. Regent's Canal Co.*, 3 D. & J. 212; *Att.-Gen. v. Great Eastern Railway Co.*, 7 Ch. 482, L. R. 6 H. L. 367; *Edinburgh, &c., Tramways Co. v. Black*, L. R. 2 H. L. Sc. 389.

(o) *Weld v. South Eastern Railway Co.*, 32 Beav. 340, 33 L. J. Ch. 142. See as to the rectification of mistakes in the plans and books of reference, 8 Vict. c. 20, s. 7; *Taylor v. Clemson*, 2 C.B. 978, 11 Cl. & Fin. 610; *Kemp v. West End of London and Crystal*

Palace Railway Co., 1 K. & J. 681.

(p) *Doe v. Bristol and Exeter Railway Co.*, 6 M. & W. 320; *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526; *Dowling v. Pontypool, &c., Railway Co.*, 18 Eq. 714. See *Finck v. London and South Western Railway Co.*, 44 C. D. 330 (C. A.); and see *Herron v. Rathmines*, (1892) A. C. 498.

(q) *Little v. Newport and Hereford Railway Co.*, 12 C. B. 752; *Att.-Gen. v. Tewkesbury and Malvern Railway Co.*, 1 D. J. & S. 423.

of Trade, substitute any engineering work not shown on the deposited plans or sections for an arch, tunnel, or viaduct, as shown thereon. Chap. V.

The promoters of a company must give notice of their intention to exercise their powers of deviation; and the owner of any lands prejudicially affected may apply to the Board of Trade to decide whether the proposed deviation is proper to be made (r). Notice of deviation must be given.

Landowners who wish to prevent the promoters of a railway company from using the powers of deviation reserved to them under 8 Vict. c. 20, ss. 11—15, should have appropriate clauses inserted in the special Act (s). If there be nothing in the special Act, or the matter in dispute having been referred to arbitration, there be nothing in the reference to arbitration, or in the award consequent thereon, to prevent them from doing so, a company may exercise the powers of deviation as they think best within those limits (t).

A landowner is not entitled to an injunction to restrain a railway company from proceeding with their works, although they are deviating to a greater extent than is authorised by 8 Vict. c. 20, ss. 11—15, unless he can show that he is substantially injured by the deviation (u). Party who seeks to restrain a company from deviation must show that he is injured.

Land which is necessary for the erection of stations and other conveniences for the proper working of the railway, or for the purpose of constructing the works authorised by 8 Vict. c. 20, s. 16, may be taken, though it is beyond the limits of deviation (x), provided such land be scheduled in the Act and included in the plans and books of reference (y). Land necessary for convenience may be taken, though beyond the limits of deviation.

(r) 8 Vict. c. 20, s. 12. See *Pearce v. Wycombe Railway Co.*, 1 Drew. 244, 17 Jur. 660. *and South Wales Union Railway Co.*, 10 W. R. 210; *Finck v. London and South Western Railway Co.*, 44 C. D. 330 (C. A.).

(s) *Eton College v. Great Western Railway Co.*, 1 Ra. Ca. 200.

(t) *Wood v. North Staffordshire Railway Co.*, 1 Mac. & G. 278, 284; *Selby v. Colne Valley and Halstead Railway Co.*, 10 W. R. 661.

(u) *Holyoake v. Shrewsbury and Birmingham Railway Co.*, 5 Ra. Ca. 421, 427. See *Wintle v. Bristol*

(x) *Cother v. Midland Railway Co.*, 2 Ph. 469; *Sadd v. Maldon, Braintree, and Witham Railway Co.*, 6 Exch. 143. See *Wood v. Epsom and Leatherhead Railway Co.*, 8 C. B. N. S. 731.

(y) *Doe v. North Staffordshire Railway Co.*, 16 Q. B. 526; *Dowling*

Chap. V.

Land may not be taken, except for the proper purposes of the Act, although within the limits of deviation.

On the other hand, a company may be restrained from taking land not required for the purpose of enabling its works to be constructed in a proper and convenient manner, even although such land be within the limits of deviation. Thus a railway company was restrained from taking a piece of land for the purpose of making an embankment and a greater slope on each side of a cutting, and from claiming more land than was declared by a referee to be necessary for the purposes of the Act (z). So a railway company was restrained from taking land for the purpose of excavating materials therefrom to be used in completing an embankment, though it was within the limits of deviation (a). So, also, a railway company was restrained from taking land for the purpose of altering a road, so as to be a convenience to a neighbouring proprietor, though the land lay within the limits of deviation (b); and where a railway company had served notice under sect. 32 of the Railways Clauses Act, 1845, with the intention of taking temporary possession of land and constructing a railroad thereon, an injunction was granted (c).

Company—when restrained from exercising powers of deviation.

The Court will not, on the ground of public inconvenience, restrain a railway company keeping within their powers of deviation from deviating from the plan, unless it can be shown that they are acting capriciously (d).

8 Vict. c. 20,
s. 16.

By the 16th and 19th clauses of the Railways Clauses Consolidation Act, 8 Vict. c. 20, railway companies are empowered to execute certain works in the mode and in the manner therein mentioned (e). By the 16th clause it is declared that they shall in the execution of such works do as little

v. *Pontypool, &c., Railway Co.*, 18 Eq. 714; *Finck v. London and South Western Railway Co.*, 44 C. D. 330 (C. A.); and see *Protheroe v. Tottenham, &c., Railway Co.*, (1891) 3 Ch. 278 (C. A.).

(z) *Webb v. Manchester and Leeds Railway Co.*, 4 M. & C. 116, 48 B. R. 28.

(a) *Eversfield v. Mid-Sussex Railway Co.*, 3 D. & J. 286. See also *Bentinck v. Norfolk Estuary Co.*, 8

D. M. & G. 714.

(b) *Dodd v. Salisbury and Yeovil Railway Co.*, 1 Giff. 158, 163; aff. 33 L. T. O. S. 311.

(c) *Morris v. Tottenham and Forest Gate Railway Co.*, (1892) 2 Ch. 47.

(d) *Att.-Gen. v. Great Western Railway Co.*, 14 W. R. 726.

(e) See *Rangeley v. Midland Railway Co.*, 3 Ch. 306; *Att.-Gen. v. Ely, &c., Railway Co.*, 4 Ch. 194.

damage as can be. A railway company may erect buildings over streets in a town for the construction of stations, warehouses, &c., or may divert the course of a road or river, if it is necessary or reasonably convenient for the purposes of the line (*f*). But an act is not necessary within the meaning of the clause merely because it enables the company to execute their works more economically (*g*).

Section 53 of 8 Vict. c. 20 provides that if the company find it necessary to interfere with any road, either public or private, so as to make it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, they are first to provide a sufficient road in substitution for it (*h*). This section applies to a permanent diversion, as well as to a temporary diversion of a road (*i*).

By 8 Vict. c. 20, s. 76, the owners or occupiers of lands adjoining a railway are empowered to lay down branches communicating with the railway, and the railway company is required to make openings in the line or sidings for the branches at places to be approved by the company (*k*). The assent of a company to an opening being made at a station is not in the nature of a licence, and cannot be revoked (*l*).

By 8 Vict. c. 20, s. 87 (*m*), railway companies are empowered to enter into contracts with other railway companies for passing over each other's lines upon the payment of such

8 Vict. c. 20,
s. 76.
Sidings to
railways.

Powers of
passing over
line.

(*f*) *Att.-Gen. v. Eastern Counties Railway Co.*, 2 Ra. Ca. 823; *Pugh v. Golden Valley Railway Co.*, 15 C. D. 330.

(*g*) *Fenwick v. East London Railway Co.*, 20 Eq. 544; *Pugh v. Golden Valley Railway Co.*, 15 C. D. 330; *Morris v. Tottenham and Forest Gate Railway Co.*, (1892) 2 Ch. 47. But see *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409.

(*h*) See *Kemp v. London and Brighton Railway Co.*, 1 Ra. Ca. 505; *Att.-Gen. v. Great Northern Railway Co.*, 3 De G. & S. 439;

Att.-Gen. v. London and South Western Railway Co., 4 De G. & S. 75. A road already existing is not a substituted road within the meaning of the clause, *Att.-Gen. v. Great Northern Railway Co.*, 4 De G. & S. 75.

(*i*) *Att.-Gen. v. Barry Docks, &c., Co.*, 35 C. D. 573.

(*k*) See *Woodruff v. Brecon and Merthyr Railway Co.*, 28 C. D. 190 (C. A.).

(*l*) *Bell v. Midland Railway Co.*, 10 C. B. N. S. 287, 3 D. & J. 673.

(*m*) Amended by 26 & 27 Vict. c. 92, ss. 22—29.

Chap. V. tolls and under such restrictions as may be mutually agreed upon, and to enter into a contract for the division or apportionment of the tolls with the view of carrying out this object. The clause does not authorise an agreement which will amount in fact to a lease, or to a transfer of the undertaking to another company (*n*), or which will have the effect of enabling one company to carry the whole of the traffic of another company, under colour of passing over the line of the other company (*o*); but merely gives to one party a limited power to run a portion of its traffic over the other line (*p*).

An agreement between two railway companies, giving one company the power to pass over the line of the other on certain specified terms, confers rights of a permanent nature, and is not a mere licence determinable at will. The terms of the agreement are not too vague, but will be held to concede a user consistent with the proper enjoyment of the railway, the subject-matter of the contract, and with the rights of the granting party (*q*). Where an agreement has been entered into between two companies as to the terms of passing over each other's lines, the rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the Railways Clauses Consolidation Act, 8 Vict. c. 20, s. 87 (*r*).

8 Vict. c. 20,
s. 92.

Where a railway company refused to allow the plaintiffs to run engines and carriages over part of their line under the powers of clause 92, the Court would not, at the suit of the plaintiffs, restrain the company from preventing the exercise of the right. The ground of the decision was that inasmuch as the plaintiffs could not run over the lines unless the points and signals on the line were properly worked by the railway

(*n*) *Great Northern Railway Co. v. Eastern Counties Railway Co.*, 9 Ha. 306; cf. *Midland Railway Co. v. Great Western Railway Co.*, 8 Ch. 841.

(*o*) *Simpson v. Denison*, 10 Ha. 51; cf. *Midland Railway Co. v. Great Western Railway Co.*, 8 Ch. 841.

(*p*) *Winch v. Birkenhead Railway*

Co., 5 De G. & S. 562; *Simpson v. Denison*, 10 Ha. 51.

(*q*) *Llanelly Railway, &c., v. London and North Western Railway Co.*, 8 Ch. 942, 949; L. R. 7 H. L. 550.

(*r*) *Great Northern Railway Co. v. Eastern Counties Railway Co.*, 9 Ha. 306.

company, the Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court (*s*).

Chap. V.

Where a railway company is empowered by its Act to form a junction with another line of railway, the latter company will be restrained from interfering with the former company in making the junction (*t*). But in making the junction a company may not take the land or interfere with the works of the company or person to whom the other railway belongs, or any of the works thereof, further than is necessary for making the junction (*u*).

The fact that a particular penalty is imposed by Statute (*x*) in the event of engines employed on a railway being so constructed as not to consume their own smoke, does not, it seems, preclude a person from applying for an injunction to restrain a nuisance (*y*).

The Court will enforce by injunction the provisions of the 115th section of the Railways Clauses Consolidation Act, that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein mentioned, notwithstanding that to enforce such right of inspection would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over the line of a competing company (*z*).

Carriages and engines to be brought on railway.

The Court will also enforce by injunction the provisions of the 117th section of the Railways Clauses Consolidation Act, that no carriage belonging to another company having the right to run over the line, shall pass along or be upon the

8 Vict. c. 20, s. 117.

(*s*) *Powell Duffryn Steam Coal Co. v. Taff Vale Railway Co.*, 9 Ch. 331; and see *Ryan v. Mutual Telephone Westminster Chambers Assoc.*, (1893) 1 Ch. 116, 128 (C. A.).

(*t*) *Great Northern Railway Co. v. East and West India Docks, &c.*, Railway Co., 7 Ba. Ca. 356.

(*u*) 26 & 27 Vict. c. 92, s. 11.

(*x*) See 8 & 9 Vict. c. 20, s. 114; and see s. 19 of 31 & 32 Vict. c. 119.

(*y*) *Smith v. Midland Railway, &c.*, Co. 25 W. R. 861, W. N. (1877) 200. But see *ante*, pp. 7, 8.

(*z*) *Midland Railway Co. v. Amburgegate, Nottingham, &c., Railway Co.*, 10 Ha. 359.

Chap. V.

railway unless it be at all times, so long as it shall be used or shall remain on the railway, of the construction and in the condition which the regulations of the company for the time being shall require.

Clause prohibiting a company from taking land without consent.

Where the special Act prohibits a company from entering upon or taking lands without the consent of the owner, his consent must be obtained before the lands are taken (a). A rival company may, under the provisions of the clause, refuse to allow their railway to be crossed, although the effect may be to prevent the undertaking from being carried into execution (b).

Owner's rights after possession taken by company.

After a company have taken lands under their compulsory powers and paid the money, the owner of the land cannot restrain them in the mode of using the land (c). Nor can a man who has sold his land to a company and given them possession, have an *interlocutory* injunction to restrain the company from continuing in possession of the land in default of payment of the purchase money. His proper remedy is to enforce his lien or to have a receiver appointed (d). But a vendor of land to a railway company is entitled to the same lien on the land for the unpaid purchase money, and the same remedies for enforcing it, as an ordinary vendor (e). Where, therefore, the unpaid vendor of land taken by a railway company *has recovered judgment* in an action against the company to enforce his lien, the Court, in default of payment of the purchase money, will grant an injunction to restrain the company from running trains over the railway and continuing in possession of the land (f).

Where a railway company had paid part of the purchase money and had taken possession, but retained the balance

(a) *Clarence Railway Co. v. Great North of England, &c., Railway Co.*, 4 Q. B. 46.

(b) *Gray v. Liverpool and Bury Railway Co.*, 9 B. 391.

(c) *East and West India Docks, &c., Railway Co. v. Dawes*, 11 Ha. 363.

(d) *Pell v. Northampton, &c.*,

Railway Co., 2 Ch. 100; *Munns v. Isle of Wight Railway Co.*, 5 Ch. 418; *Latimer v. Aylesbury, &c., Railway Co.*, 9 C. D. 385.

(e) *Wing v. Tottenham, &c., Railway Co.*, 3 Ch. 740.

(f) *Allgood v. Merrybent, &c., Railway Co.*, 33 C. D. 571.

until a good title could be shown, the Court held that they had purchased the right of possession, and would not restrain the company from continuing in possession of the land until payment of the balance into Court (g). Chap. V.

Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway, and may impose upon the rest of the public any terms they think proper as the condition of admittance. Accordingly, a railway company having a hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform by the condition that such servants when attending at the platform shall not wear a distinctive badge or livery (h).

The Commissioners of Sewers have power under Michael Angelo Taylor's Act (i) for the purpose of widening, altering, and improving streets and public places in the Metropolis, to take houses and lands or any part thereof which shall be adjudged by them to be necessary for carrying out the purposes of the section. They have no power to take houses or lands simply for the purpose of altering the levels, and in order to take lands for the purpose of widening or altering a street there must be a *bonâ fide* belief that the widening or altering of the street is wanted for the improvement of the street within the meaning of the section. An adjudication by them that houses or lands are necessary for carrying out the purposes of the section must, in order to be final and conclusive, be an honest and *bonâ fide* adjudication. It must also be an adjudication which bears some relation to reason. If they come reasonably to the conclusion that the whole of a house or piece of land is required for enabling them to carry out improvements in respect of which they can take land com-

57 Geo. III.,
c. xxix., s. 80.

(g) *Capps v. Norwich and Spalding Railway Co.*, 9 Jur. N. S. 635.

(h) *Perth General Station Committee v. Ross*, (1897) A. C. 479.

(i) 57 Geo. III. c. xxix., s. 80. The

powers, duties, and liabilities of the Commissioners of Sewers have been transferred to the Common Council of the City of London by 60 & 61 Vict. c. cxxxiii.

Chap. V.

pulsorily, their adjudication will be upheld. But they have no power to adjudicate that the possession of the whole of a house or piece of land is necessary for the purpose of improvements where they only intend to use a part of it for that purpose, though if they made such adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned (*k*). In *Teuliere v. Vestry of St. Mary Abbots* (*l*) where a metropolitan vestry required for the purpose of widening a street part of the buildings and site of an orphanage that would leave a substantial portion of the premises, it was held that the owners being willing to sell the part required only, the vestry could not take the whole. On the other hand, a vestry will be restrained from taking part only of a house where what is taken is a substantial portion so that the house and the use and substantial enjoyment of it can no longer be enjoyed as before (*m*).

Public Health Act, 1875.

If a Local Board of Health, in the execution of their parliamentary powers, are interfering with property in a manner not authorised by the Public Health Act, 1875, s. 327, they will be restrained from doing so, and the person injured will not be left to his remedy under the compensation clauses of the Act (*n*). Section 149 of the Public Health Act, 1875, which vests certain streets in an urban authority, does not vest the subsoil. Accordingly, where a local Act empowered the urban authority to erect on land belonging to them or under their control lavatories for the use of the public, it was held that the urban authority had no power to excavate the soil and erect lavatories below the surface of the street which had vested in them within the meaning of the Public Health Act, 1875 (*o*). Where a local board has under the provisions of sects. 155—158 of the Act prescribed the line in which any

(*k*) *Gard v. Commissioners of* 2 Q. B. 742.

Sewers, 28 C. D. 486; *Lynch v. Commissioners of Sewers*, 32 C. D. 72.

(*l*) 30 C. D. 645.

(*m*) *Gibbon v. Paddington Vestry*, (1900) 2 Ch. 794; and see *Gordon v. Vestry of St. Mary Abbots*, (1894)

(*n*) *Grand Junction Canal Co. v. Shugar*, 6 Ch. 483; *Roberts v. Gwyrfa District Council*, (1899) 2 Ch. 608 (C. A.).

(*o*) *Mayor, &c., of Tunbridge Wells v. Baird*, (1896) A. C. 434. See also *Battersea Vestry v. County of*

building which has been pulled down shall be rebuilt, the Court will restrain parties from rebuilding otherwise than in the manner prescribed (*p*). Chap V.

The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, Metropolis Management Act, 1855. s. 96, does not confer upon a vestry or Board of Works constituted under that Statute such a property in the streets situate within their district as to entitle them to maintain an action for an injunction against the erection of a telephone wire across the street, the telephone being erected at a great height and causing no appreciable danger to the public or to the traffic in the street (*q*). So, also, where an electric lighting company had illegally broken up the surface of a street within the district of a vestry in the Metropolis and placed their pipes and wires at a depth of about two feet below the surface, it was held that the vestry could not maintain an action for an injunction to compel the company to remove their pipes and wires (*r*).

Under the Metropolis Management Amendment Act, 1862, Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102. 25 & 26 Vict. c. 102, ss. 74, 75 (*s*), the Board had power to require houses to be set back, paying compensation to the owners; and to pull down houses which interfere with the general line of buildings in a street. But the requisitions of the Act must be complied with (*t*).

The Thames Embankment Act, 1862, 25 & 26 Vict. c. 93, Thames Embankment Act, 1862. incorporates the Lands Clauses Act, with the additional provision that the word "land" shall include easements and interests in land. The owner of a wharf on the Thames

London, &c., Lighting Co., (1899) 1 Ch. 474 (C. A.).

(*p*) *Newhaven Local Board v. Newhaven School Board*, 30 C. D. 365 (C. A.) See *Att.-Gen. v. Hatch*, (1893) 3 Ch. 36 (C. A.).

(*q*) *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. D. 904. See, however, *Finchley Electric Light Co. v. Finchley Urban District Council*, (1902) 1 Ch. 886. See sect. 14 of the Electric Lighting Act, 1882, and sect. 13, sub-sect. (1) of the

Public Health Act, 1890.

(*r*) *Battersea Vestry v. County of London, &c., Electric Lighting Co.*, (1899) 1 Ch. 474 (C. A.)

(*s*) Repealed by the London Building Act, 1894, but in substance re-enacted by sects. 22 and 31 of that Act.

(*t*) See *Lord Auckland v. Westminster Local Board of Works*, 7 Ch. 597; and *London County Council v. Pryor*, (1896) 1 Q. B. 330, 465.

Chap. V.

had a right of free access to the river, and also the right of loading and unloading his barges at the wharf, but there was no campshed or hard. The barges only rested at low water on the mud of the foreshore. The Court held that the filling up the river in front of the wharf was not a taking or using for the purposes of the undertaking any easement or interest, and refused to restrain the defendants from proceeding with their works until they had complied with the provisions of sect. 84 of the Lands Clauses Act (*u*).

Account in cases of trespass for working of mines.

The account in cases of trespass for the underground working of mines will, in the absence of fraud, be limited to minerals gotten within six years before the bringing of the action (*x*). But the account will not be limited to minerals gotten within six years from the bringing of the action, if the minerals have been taken by a concealed and fraudulent trespass so long as the party defrauded remains in ignorance without any fault or laches of his own (*y*).

In taking the account in trespass for the underground working of mines, where the minerals have been taken fraudulently, the wrongdoer will be charged the full value of the minerals when gotten, without being allowed the expenses of getting or severing them (*z*); although the expenses of raising the coal to the pit's mouth will be allowed (*a*). But if there be no suggestion of fraud, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the minerals at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing them

(*u*) *Macey v. Metropolitan Board of Works*, 33 L. J. Ch. 377. See *The Temple Pier Co. v. Metropolitan Board of Works*, 34 L. J. Ch. 262. Cf. *Clarke v. School Board of London*, 9 Ch. 124.

(*x*) *Dean v. Thwaite*, 21 Beav. 623; *Daves v. Bagnall*, 23 W. R. 690; *Trotter v. Maclean*, 13 C. D. 587.

(*y*) *Bulli Coal Mining Co. v. Osborne*, (1899) A. C. 351.

(*z*) *Martin v. Porter*, 5 M. & W.

351; *Philipps v. Homfray*, 6 Ch. 770; *Llynvi Co. v. Brogden*, 11 Eq. 188; *Trotter v. Maclean*, 13 C. D. 587; *Taylor v. Mostyn*, 33 C. D. 226; and see *Whitham v. Westminster Brymbo Coal Co.*, (1896) 2 Ch. 538 (C. A.).

(*a*) *Llynvi Co. v. Brogden*, 11 Eq. 188; *Philipps v. Homfray*, 6 Ch. 770; *Trotter v. Maclean*, 13 C. D. 587; *Taylor v. Mostyn*, 33 C. D. 226.

to bank, so as to place the owner in the same position as if he had himself severed and raised the minerals (*b*).

If there be evidence of damage to the mine from wrongful working, an inquiry will be directed as to what should be allowed to the plaintiff as compensation for such damage (*c*). The defendant may be ordered to pay the plaintiff compensation for the damage done by breaking down the barrier between the mines (*d*), or for the damage sustained by the plaintiff in being obliged to leave additional barriers (*e*). He may also be charged with a way-leave rent in respect of air courses and roads through the mine of the plaintiff (*f*).

If a man trespass on the mine of another and wrongfully work it, and get coal there, but in the course of his working leave other coal unworked, which by reason of his wrongful working becomes so diminished in value that he cannot work it at a profit, the mine owner is entitled to damages for the coal so rendered useless, as well as for that actually gotten by the defendant (*g*).

Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, who cannot, however, dig for them without the copyholder's permission. In a case where the lord of a manor had entered upon a copyhold tenement and taken coprolites without the consent of the copyholder, it was held that the copyholder could maintain an action for an injunction and damages, and that the proper measure of damages was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of

(*b*) *Jegon v. Vivian*, 6 Ch. 742; 188, 192.

Re United Merthyr Collieries Co., 15 Eq. 47; *Ashton v. Stock*, 6 C. D. 719; *Livingstone v. Rawyards Coal Co.*, 5 App. Ca. 25, 40; *Trotter v. Maclean*, 13 C. D. 587.

(*c*) *Jegon v. Vivian*, 6 Ch. 742; *Taylor v. Mostyn*, 33 C. D. 226; and see *Hunt v. Peake*, Johns. 705.

(*d*) *Llynvi v. Broyden*, 11 Eq.

K.I.

(*e*) *Powell v. Aikin*, 4 K. & J. 343.

(*f*) *Jegon v. Vivian*, 6 Ch. 742; *Philipps v. Homfray*, ib. 780, 24 Ch. 430; and see *Whitham v. Westminster Brymbo Coal, &c., Co.*, (1896) 1 Ch. 894, (1896) 2 Ch. 538.

(*g*) *Williams v. Raggett*, 25 W. R. 874, 46 L. J. Ch. 849.

Chap. V.

Mandatory
injunctions in
cases of
trespass.

profit as would have induced a stranger to undertake the working (*h*).

The Court will interfere by mandatory injunction against trespass (*i*). If the trespass or damage is complete and the title is a pure legal title, the Court would not in general interfere by way of mandatory injunction, there being a full remedy at law by ejectment (*k*). But if the damage is serious, or the trespass is of a continuing nature, the Court may interfere by way of mandatory injunction, notwithstanding the existence of a remedy at law (*l*). In *Robinson v. Lord Byron* (*m*), the defendant having penned up the water of a stream which flowed through his park so as to prevent it flowing in its usual course to the plaintiff's mill, and at other times letting it on in such quantities as to endanger the mill of the plaintiff, he was restrained by mandatory injunction. So also in a case where the plaintiffs had made out their right at law to build a bridge over the defendants' railway, and as a temporary easement to erect poles and other temporary obstructions upon land adjacent to the defendants' railway, and the defendants had, in order to prevent the plaintiffs from so temporarily using their land, built up a wall which effectually prevented the plaintiffs from carrying on their works, a mandatory injunction was granted restraining the defendants from continuing to use the wall, and from preventing the plaintiffs from making the bridge (*n*). So also where water-pipes had without the consent of the owner of the soil been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted (*o*). So also a railway company was

(*h*) *Att.-Gen. v. Tomline*, 5 C. D. 750.

(*i*) See *ante*, pp. 31—34, as to mandatory injunctions.

(*k*) *Deere v. Guest*, 1 M. & C. 516; *Moreland v. Richardson*, 22 Beav. 604. See *Att.-Gen. v. Manchester and Leeds Railway Co.*, 1 R. Ca. 436.

(*l*) *Martyr v. Lawrence*, 2 D. J. & S. 261; *London and North Western Railway Co. v. Lancashire*

and Yorkshire Railway Co., 4 Eq. 174.

(*m*) 1 Bro. C. C. 588.

(*n*) *Great North of England, &c., Junction Railway Co. v. Clarence Railway Co.*, 1 Coll. 507. See *Philipps v. Treeby*, 8 Jur. N. S. 999.

(*o*) *Goodson v. Richardson*, 9 Ch. 221. See as to form of order, 1 Set. 556.

restrained from permitting trucks or carriages to stand across level crossings so as to obstruct or impede the user of them by the plaintiff (*p*). So also parties were restrained from continuing to put a tramway upon a road (*q*). So also a man was restrained from leaving furniture on the premises and having a person in possession thereof (*r*). So also a man was restrained from leaving logs of timber on premises of which he had agreed to give up possession at the end of his lease, and from which he was evicted by a writ of possession (*s*). So also where the lessees of a coal mine had made apertures to ventilate the mine through the land of the plaintiff, and had mortgaged their interest in the mine to the defendants, who began to work the mine and continued to use the apertures, the Court granted an injunction which was in some respects of a mandatory nature, restraining them from continuing to use the apertures, but declined to grant a mandatory injunction ordering them to fill up the apertures, inasmuch as they had not made them (*t*). So also a coalowner who had worked into the mines of his neighbour was restrained from permitting the ways, passages, and apertures made by him to remain open (*u*). So also the lessee of a coal mine was restrained from conducting or allowing to pass any water into a neighbouring mine by means of troughs, bore-holes, or air-drifts (*x*). So also the trustees of a road were restrained from making an encroachment upon plaintiff's land by making buttresses, &c. (*y*). So also in *Manchester, Sheffield, and Lincolnshire Railway Co. v. Worksop Board of Health* (*z*), a Board of Health was restrained by mandatory injunction from permitting a sewer

(*p*) *United Land Co. v. Great Eastern Railway Co.*, 10 Ch. 592.

(*q*) *Neath Canal Co. v. Ynisarwed, &c., Colliery Co.*, 10 Ch. 450. See as to form of order, 1 Set. 557; see also *Att.-Gen. v. Widness Railway Co.*, 22 W. R. 607, W. N. (1874) 91.

(*r*) *Smith v. Brown*, W. N. (1879) 159.

(*s*) *Guinness v. Fitzsimons*, 13 L. R. I. 73.

(*t*) *Powell v. Aikin*, 4 K. & J. 355.

(*u*) *Bell v. Joel*, 1 Set. 575; *Eardley v. Lord Granville*, 3 C. D. 826.

(*x*) *Westminster Brymbo Coal, &c., Co. v. Clayton*, 36 L. J. Ch. 476; *West Cumberland Iron, &c., Co. v. Kenyon*, 6 C. D. 773. See *Plant v. Stott*, 21 L. T. 106.

(*y*) *Holmes v. Upton*, 9 Ch. 214, n.

(*z*) 23 Beav. 209.

to remain open (a). So also a man was restrained by mandatory injunction from permitting a building which he had erected on the roof of a neighbour's house to remain there (b). So also a man was restrained from making such alterations in a building so as to cover up a *fascia* which was parcel of the house of his neighbour (c). So also a man was restrained at the suit of his wife from continuing in possession of a house which formed part of her separate estate (d). So also the manager of a business was restrained from excluding the owner of the business from the business premises (e).

In a case where a wall had been knocked down, the Court would not interfere by way of mandatory injunction, so as to order it to be built up again, but left the plaintiff to his remedy by damages at law (f).

(a) See *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 547; *Wood v. Saunders*, 10 Ch. 584.

(b) *Martyr v. Lawrence*, 3 D. J. & S. 261.

(c) *Francis v. Hayward*, 22 C.

D. 179.

(d) *Green v. Green*, 5 Ha. 400, n.

(e) *Eachus v. Moss*, 14 W. R. 327.

(f) *Doran v. Carroll*, 11 Ir. Ch. 379.

CHAPTER VI.

INJUNCTIONS AGAINST NUISANCE.

SECTION I.—PRINCIPLES ON WHICH THE COURT ACTS IN RESTRAINING NUISANCE.

THE jurisdiction of the Court by way of injunction in cases of nuisance is in aid of the legal right, and has for its object the protection of property from irreparable or at least from substantial and material damage pending the trial of the right. If the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the Court by way of injunction (a). The jurisdiction was formerly exercised sparingly and with caution (b), but it is now fully established, and will be exercised as freely as in other cases in which the aid of the Court is sought for the purpose of protecting legal rights from violation.

Chap. VI.
Sect. 1.

A nuisance is an act unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of other persons. In the case of trespass it is the immediate act which causes the injury; in the case of nuisance the injury is the consequence of an act done beyond the bounds of the property affected by it (c).

Nuisance as distinguished from trespass.

Nuisances may be either of a private or a public nature. The only distinction between the two cases is, that a private

Nuisances are public or private.

(a) *Att.-Gen. v. Nicholl*, 16 Ves. 338, 10 R. R. 186; *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 319; *Wilson v. Townend*, 8 Dr. & Sm. 329; *Att.-Gen. v. Brighton, &c., Supply Association*, (1900) 1 Ch. 276 (C. A.).

(b) 3 M. & K. 180, *per* Lord Brougham.

(c) *Reynolds v. Clarke*, 2 Lord Raym. 1399; see also *Weeton v. Woodcock*, 5 M. & W. 594; *Harrison v. Goode*, 11 Eq. 338.

Chap. VI.
Sect. 1.

nuisance is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation (*d*). “I conceive,” said Kindersley, V.-C., in *Soltau v. De Held* (*e*), “that to constitute a public nuisance, the thing must be such as in its nature and consequences is a nuisance, an injury, or damage to all persons coming within the sphere of its operations, though it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of smoke or of noxious effluvia are emitted. To all persons who are at all within the range of these operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it, it may be a greater nuisance, a greater inconvenience, than it is to those who are more remote to it; but still to all who are within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, the most ordinary case of a public nuisance, the stopping of the king’s highway, that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life, than it is to a person who has to travel it once a year or once in five years; but it is more or less a nuisance to everyone who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, then, I conceive, it does not come within the meaning of the term public nuisance (*f*). The case before me is a case in point. A peal of bells may be and is no doubt an extreme nuisance to a person who lives within a very few feet or yards of them; but to a person who lives at a distance from them, although he is within the reach of their sound, it may be a positive pleasure, for I cannot assent to

(*d*) See *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. p. 320.

(*e*) 2 Sim. N. S. 142.

(*f*) See *Squire v. Campbell*, 1 M. & C. 459, 486, 43 R. R. 231.

the proposition that in all circumstances and under all conditions the sound of bells must be a nuisance. . . . I may further say that it does not follow because a thing complained of is a nuisance to several individuals, that therefore it is a public nuisance. One may illustrate this very simply by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen dwelling-houses. It does not follow, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one wall, that therefore it is a public nuisance which can be indicted at the suit of the Crown, or for which the Attorney-General can file an information in this Court. It is a private nuisance to each of the individuals aggrieved" (g).

If the thing complained of is in its nature a public nuisance, the remedy is by action in the nature of an information at the suit of the Attorney-General (h). The circumstance, however, that the thing complained of may be a public nuisance, does not prevent an individual who has sustained special damage from bringing an action (i). There may, in such cases, be both an information and an action. The Attorney-General may file an information to restrain the thing complained of as a public nuisance, and the individual who sustains a particular damage may join as plaintiff, as well as relator, and have the remedy for himself by action (k). The fact that an individual may be nearer a possible cause of injury, does not entitle him to maintain an action if he has not sustained any private damage, and there is no reason to apprehend that he will

Public nuisance.
Who should sue.

(g) See *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 325; *Att.-Gen. v. Brighton, &c., Supply Association*, (1900) 1 Ch. 276 (C. A.).

(h) *Att.-Gen. v. Cleaver*, 18 Ves. 211, 18 R. R. 159, n.; *Soltau v. De Held*, 2 Sim. N. S. 150; *Tottenham Urban District Council v. Williamson and Sons, Ltd.*, (1896) 2 Q. B. 353 (C. A.); and see *ante*, p. 87.

(i) *Soltau v. De Held*, 2 Sim. N. S. 151; *Cook v. Mayor, &c.*,

of Bath, 6 Eq. 177, 180; *Benjamin v. Storr*, L. R. 9 C. P. 400, 407; *Barber v. Penley*, (1893) 2 Ch. 447.

(k) *Att.-Gen. v. Forbes*, 2 M. & C. 123, 45 R. R. 15; *Soltau v. De Held*, 2 Sim. N. S. 151; *Att.-Gen. v. United Kingdom Electric Telegraph Co.*, 30 B. 287; *Att.-Gen. v. Lord Lonsdale*, 7 Eq. 377; and see *Att.-Gen. v. Brighton Supply Association*, (1900) 1 Ch. 276 (C. A.).

Chap. VI.
Sect. 1.

sustain any (l). Nor can an individual sue, though he may be more inconvenienced by the act complained of than the rest of the public, if it has been authorised by statute, and is one which from its nature must necessarily prove a nuisance, to some one or other of the public (m). A public company exceeding its legislative limits cannot be restrained by injunction at the suit of a rival company, which does not allege that it has sustained some private injury by such excess, though the act complained of may be injurious to the public interest (n).

The right of prosecution given to the Home Secretary by the Act 21 & 22 Vict. c. 104, s. 31, does not supersede the right of persons aggrieved by a nuisance to have an injunction (o).

Grounds for
refusing
injunction.

The motives with which a suit is instituted are not generally to be regarded, but if it can be shown satisfactorily that the suit has been instituted by one man merely for the purposes of or at the instigation of another, the Court will not relieve (p). The fact, however, that the suit may have been got up by a third party is not enough to deprive a man of his right to have a nuisance discontinued (q). Nor is it wholly immaterial, where the public interest purports to be asserted or an injunction is sought on public grounds, at least upon an *interlocutory application*, to look into the motives from which or under which the matter is brought forward. If a large number of the public are in favour of the acts sought to be restrained and no proof of serious damage to individuals be made to appear, the Court will not interfere upon an interlocutory application unless the public good requires the issuing of the injunction (r).

(l) *Ware v. Regent's Canal Co.*, 3 D. & J. 212. 15 Eq. 167.

(m) *Att.-Gen. v. Conservators of Thames*, 1 H. & M. 1; *Att.-Gen. v. Metropolitan Board of Works*, *id.* p. 313. See *Biddulph v. St. George's Vestry*, 3 D. J. & S. 493.

(n) *Stockport and District Waterworks Co. v. Mayor, &c., of Manchester*, 9 Jur. N. S. 266; *Pudsey Gas Co. v. Corporation of Bradford*,

(o) *Att.-Gen. v. Metropolitan Board of Works*, 1 H. & M. 298.

(p) *Pentney v. Lynn Commissioners*, 13 W. R. 983.

(q) *Turner v. Mirfield*, 34 Beav. 390, 392.

(r) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 311, 312; *Att.-Gen. v. Cambridge Consumers' Gas Co.*, 4 Ch. 71.

If the complaint is by an individual in respect of the injury done to his own comfort and enjoyment, the proper remedy is by action. It has been held in some old cases (*s*) that two or more persons having distinct and separate tenements ought not to join as co-plaintiffs in an action to restrain a nuisance which is common to each of them. But, it is submitted, that since the alteration in Order XVI. r. 1, which came into operation in October, 1896, the rule laid down in these cases no longer holds good.

Chap. VI.
Sect. 1.
Private nuisance.

The action is usually brought by the occupier or by the lessee in possession, but the owner may sue on the ground of injury to his property, either alone or conjointly with the occupier (*t*). A lessee whose tenancy has expired during the establishment of the nuisance, but who has agreed for a renewal of the lease, may maintain an action (*u*). So also may a tenant from year to year (*x*), or even, it seems, a weekly tenant (*y*).

Who should sue.

In order that a reversioner should be able to bring an action for a nuisance, it is necessary that the wrong complained of should operate injuriously to the reversion, either by being of a permanent character or by operating as a denial of right (*z*).

Suit by
reversioner.

As between a licensee and the owner of land who grants a licence to him over the land, a right of action exists, but a licensee has no right of action in his own name against third parties who interfere with his enjoyment under the licence (*a*).

Licensee.

- (*s*) *Hudson v. Maddison*, 12 Sim. Sm. 329; *Johnstone v. Hall*, 2 K. & J. 414; *Bell v. Midland Railway Co.*, 10 C. B. N. S. 287; *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275; *Mott v. Schoolbred*, 20 Eq. 23; *Cooper v. Crabtree*, 20 C. D. 590; *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287 (C. A.).
- (*t*) *Wilson v. Townend*, 1 Dr. & S. 324; *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275; *Broder v. Saillard*, 2 C. D. 692.
- (*u*) *Gale v. Abbott*, 8 Jur. N. S. 987.
- (*x*) *Simper v. Foley*, 2 J. & H. 555; *Inchbald v. Robinson*, 4 Ch. 388, 395.
- (*y*) *Jones v. Chappell*, 20 Eq. 539, 544; see *Pluke v. Hall*, 31 Sol. J. 744.
- (*z*) *Wilson v. Townend*, 1 Dr. & 121.
- (*a*) *Ackroyd v. Smith*, 10 C. B. 164; *Whaley v. Laing*, 3 H. & N. 675, 901; *Hill v. Tupper*, 2 H. & C. 121.

Chap. VI.
Sect. 1.

Nor can an injunction be supported in any case where an action on the case for the act complained of cannot be maintained (*b*).

Parties.

If the action is brought by the occupier or lessee in possession, the landlord or reversioner need not be made a party (*c*). An undischarged bankrupt who is in possession may sue in respect of a nuisance, without joining his trustee (*d*). When the occupier of land grants a licence to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to an action to restrain the nuisance (*e*). So also the occupier of a house may be made a defendant to an action for allowing the continuance on his premises of any artificial work which causes a nuisance to his neighbour, even though it has been put there before he took possession (*f*). Leave may be obtained to add as parties occupiers who have acquired an interest since the writ was issued (*g*).

Liability of
owner of vacant
land for
nuisance.

In a case in which the defendant was the owner and occupier of a vacant piece of land in the metropolis which he had surrounded with a hoarding, but people threw filth and refuse over the hoarding on to the land, so that the condition of the land became a public nuisance, it was held that there was a common law duty upon the defendant to prevent the land being so used as to be a nuisance, and that the Attorney-General was entitled to an injunction to enforce the performance of such duty (*h*).

Nuisance arising
from acts of
several persons.

The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would not be a nuisance (*i*). A further question, however, arises whether

(*b*) *Calcraft v. West*, 2 J. & L. C. D. 71, 77.
123, 139.

(*c*) *Semple v. London and Birmingham Railway Co.*, 9 Sim. 209; see *Thorpe v. Brumfitt*, 8 Ch. 650.

(*d*) *Semple v. London and Birmingham Railway Co.*, 9 Sim. 209.

(*e*) *White v. Jameson*, 18 Eq. 303; and see *Chidnell v. Paul*, 29 W. B. 536; *Jenkins v. Jackson*, 41

(*f*) *Broder v. Saillard*, 2 C. D. 692.

(*g*) *House Property, &c., Co. v. Horse Nail Co.*, 54 L. J. Ch. 715.

(*h*) *Att. - Gen. v. Tod - Heatley*, (1897) 1 Ch. 560 (C. A.).

(*i*) *Thorpe v. Brumfitt*, 8 Ch. 650, 656; *Lambton v. Mellish*, (1894) 3 Ch. 163.

such persons can be joined together as co-defendants. It seems that they can be joined in the same action if an injunction only is claimed (*k*). But where damages are claimed it is settled that two or more persons liable to one plaintiff in respect of *separate torts*, cannot be sued in the same action (*l*). But persons liable in respect of the *same* tort may be joined as co-defendants (*m*). As a rule, the safest course where a nuisance is caused by the acts of several persons would seem to be to bring separate actions, and to apply to have them tried together (*n*).

The Court will not as a rule interfere if the damage is slight or the nuisance is merely of a temporary or occasional character (*o*): but a damage, though in itself slight, may from its continuance, or constant repetition, become sufficiently substantial for the interference of the Court (*p*). If a defendant causes a nuisance to his neighbour, it is no defence to say that he is making a reasonable use of his premises (*q*). In estimating the injury the Court has regard to all the consequences which may flow from the nuisance, not only to its present effect upon the comfort and convenience of the occupier, but also to any prospective increase of the nuisance and the probable detriment of the estate. If the Court is

When the Court
will interfere.

(*k*) See *Thorpe v. Bruaflitt*, 8 Ch. 650, and *Sadler v. Great Western Railway Co.*, (1896) A. C. 450, 454.

(*l*) *Sadler v. Great Western Railway Co.*, (1896) A. C. 450; *Gower v. Couldridge*, (1898) 1 Q. B. 348 (C. A.); *Thompson v. London County Council*, (1899) 1 Q. B. 840. See, however, *Public Health (London) Act*, 1891, s. 120; *Rivers Pollution Act*, 1876, s. 2.

(*m*) *Frankenburg v. Great Horseless Carriage Co.*, (1900) 1 Q. B. 504, 509, 512.

(*n*) See *Lambton v. Mellish*, (1894) 1 Ch. 163; and see *Sadler v. Great Western Railway Co.*, (1895) 2 Q. B. p. 693.

(*o*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 322; *Swaine v.*

Great Northern Railway Co., 4 D. J. & S. 211; *Cooke v. Forbes*, 5 Eq. 166; *Att.-Gen. v. Consumers' Gas Co.*, 4 Ch. 71, 80; *Llandudno Urban Council v. Woods*, (1899) 2 Ch. 705; *Att.-Gen. v. Mayor, &c., of Preston*, 13 T. L. R. 14.

(*p*) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Att.-Gen. v. Consumers' Gas Co.*, 4 Ch. 81; *Grand Junction Canal Co. v. Shugar*, 6 Ch. 489; *Clewes v. Staffordshire Potteries Co.*, 8 Ch. 142; *Thorpe v. Bruaflitt*, ib. 656; *Lambton v. Mellish*, (1894) 3 Ch. 163.

(*q*) *Att.-Gen. v. Cole*, (1901) 1 Ch. 205. See, however, *Sanders-Clark v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373.

Chap. VI.
Sect. 1.

satisfied that some degree of nuisance has been proved to exist, and to have been increasing, the Court, in determining whether it should interfere, must have regard to its further continuance or increase: the interference of the Court in cases of prospective injury must depend upon the nature and intent of the apprehended mischief, and upon the certainty or uncertainty of its increase or continuance; and the fact of the nuisance having commenced raises a presumption of its continuance (*r*). In determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it (*s*). The mere fact that a certain act may cause a diminution in the value of property does not make that act a nuisance (*t*), but diminution in the value of property is often of great moment as evidence of the extent of a nuisance (*u*).

Evidence of
scientific
witnesses.

In estimating the character of a nuisance, more weight is due to the facts which are proved than to the conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are of value in aid or explanation and qualification of the facts which are proved; but it is upon the facts which are proved, and not upon such conclusions, that the Court ought mainly to rely (*x*).

Where a man who is entitled to a limited right exercises it in excess so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits (*y*).

(*r*) *Goldsmid v. Tunbridge Wells Commissioners*, 1 Ch. 349, 354.

(*s*) *Ib.*; *Att.-Gen. v. Mayor, &c., of Basingstoke*, 45 L. J. Ch. 729.

(*t*) *Squire v. Campbell*, 1 M. & C. 459, 486, 43 R. R. 231; *Soltau v. De Held*, 2 Sim. N. S. 133, 158; *Harrison v. Goode*, 11 Eq. p. 353.

(*u*) *Soltau v. De Held*, 2 Sim. N. S. 158; *White v. Cohen*, 1 Drew.

318. See *Jackson v. Duke of Newcastle*, 3 D. J. & S. 285.

(*x*) *Goldsmid v. Tunbridge Wells Commissioners*, 1 Ch. 349, 353; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 156.

(*y*) *Charles v. Finchley Local Board*, 23 C. D. 773; but see *Brown v. Dunstable Corporation*, (1899) 2 Ch. 378.

If a plaintiff applies for an injunction to restrain the violation of a common law right and establishes his right at law, he is entitled, except under special circumstances, to an injunction as of course (z). Moreover, there is no rule that it is contrary to the practice of the Court to grant an injunction where the nuisance has ceased after action brought, though there is no doubt that the Court can, in such a case, in the exercise of its discretion, refuse the injunction (a).

Chap. VI.
Sect. 1.

Cesser of
nuisance after
action brought.

The Court will not in general interfere until an actual nuisance has been committed; but it may by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance (b). The plaintiff, however, must show a strong case of probability that the apprehended mischief will in fact arise in order to induce the Court to interfere (c). If there is no reason for supposing that there is any danger of mischief of a serious character being done before the interference of the Court can be invoked, an injunction will not be granted. In a case, accordingly, where no actual damage had been done, and it appeared to the Court that it was quite possible, by the use of due care, to prevent a foul liquid from flowing into a river, as well as that some method might be discovered of rendering the liquid innocuous, the Court would not grant an injunction (d).

Threatened
injury.

If the defendant asserts positively that his acts will not

Intention of
defendant not
to commit
nuisance.

(z) *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600.

(1893) 2 Ch. 87; and see *ante*, p. 13.

(a) *Chester (Dean) v. Smelting Corporation*, 85 L. T. 67, (1901) W. N. 179; and see *Batcheller v. Tunbridge Wells Gas Co.*, 84 L. T. 765; *Barber v. Penley*, (1893) 2 Ch. pp. 460, 461.

(c) *Att.-Gen. v. Corporation of Manchester*, (1893) 2 Ch. 87 (C. A.); and see *Earl of Ripon v. Hobart*, 3 M. & K. 169, 41 R. R. 40; *Att.-Gen. v. Mayor of Kingston*, 34 L. J. Ch. 481.

(b) *Haines v. Taylor*, 2 Ph. 209; *Dawson v. Paver*, 5 Ha. 415, 430; *Potts v. Levy*, 2 Drew. 272; *Elwell v. Crowther*, 31 Beav. 169; *Att.-Gen. v. Corporation of Manchester*,

(d) *Fletcher v. Bealey*, 28 C. D. 688; and see *Att.-Gen. v. Corporation of Manchester*, (1893) 2 Ch. 87 (C. A.). As to form of order in *Fletcher v. Bealey*, see 33 W. R. 748.

Chap. VI.
Sect. 1.

cause a nuisance, or that it is his intention to guard against committing nuisance, and there is no reason to discredit the assertion, the Court will not interfere (e), even though he refuses to give an undertaking (f); but if he claims the right to do the act complained of and refuses to give an undertaking, the Court will infer that there will be a repetition of the nuisance (g).

Action by a
purchaser.

It seems that a purchaser who has not accepted the title cannot sue anyone (other than the vendor) to protect the property from injury (h).

Nuisance by
incorporated
companies.

Companies incorporated by Act of Parliament and having compulsory powers to take lands and construct works, are bound to act in strict accordance with the powers which have been vested in them by the legislature. If they act in excess of their statutory powers and cause damage to the property of others, or if, though keeping within their statutory powers, they construct their works in so unskilful or negligent a manner as to cause unnecessary injury to private rights, the parties aggrieved thereby may maintain actions against them, and may, when such is the appropriate remedy, obtain an injunction (i). The limits to the doctrine that statutory powers must be exercised in such a manner as not to cause more damage than necessary, are well illustrated by a recent case (k). In this case, the plaintiffs, a water company, claimed an injunction to restrain a local body from lowering the surface of certain streets under which the plaintiffs' pipes were laid in such a manner as to leave the pipes without a sufficient

(e) *Warburton v. London and Blackwall Railway Co.*, 1 Ra. Ca. 558; *Haines v. Taylor*, 2 Ph. 209; *Wandsworth Board of Works v. London and South Western Railway Co.*, 31 L. J. Ch. 854; *Fletcher v. Bealey*, 28 C. D. 688.

(f) *Cowley v. Byas*, 5 C. D. 944.

(g) *Phillips v. Thomas*, 62 L. T. 793.

(h) *Heath v. Maydew*, 13 W. R. 199. *Sed quære.*

(i) *Frewin v. Lewis*, 4 M. & C.

249, 255, 48 R. R. 88; *Imperial Gas Co. v. Broadbent*, 7 D. M. & G. 436, 459, 7 H. L. C. 600; *Grand Junction Canal Co. v. Shugar*, 6 Ch. 483, 488; *Clowes v. Staffordshire Railway Co.*, 8 Ch. 125, 139; *Geddis v. Proprietors of Bann Reservoir*, 3 App. Ca. 430; and see *Lambert v. Corporation of Lowestoft*, (1901) 1 Q. B. 590, 594.

(k) *Southwark, &c., Water Co. v. Wandsworth Board of Works*, (1898) 2 Ch. 603 (C. A.).

covering of soil to protect them from injury by frost or otherwise. The real dispute was whether the plaintiffs or the defendants ought to bear the cost of lowering the position of the pipes. The injunction was refused. Collins, L. J., in his judgment (*l*), said: "The point urged is that the plaintiffs have suffered damage by the exercise by the defendants of their statutory powers; that the defendants were armed by the same statute (*m*) with other powers which, if used, would have mitigated the damage, and that therefore they were bound to use them. . . . It is not on the assertion of a statutory duty that the argument for the defendants' liability is, or must be based, but on the broader proposition that being possessed of a power of mitigating damage arising from their proceedings under the statute, they are bound to exercise it. So stated it is merely an assertion of the proposition so frequently affirmed that where statutory rights infringe what but for the statute would be the rights of other persons, they must be exercised reasonably so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. . . . Here the levelling of the road could be, and was effectually carried out without in any way disturbing the plaintiffs' pipes or infringing any of their rights. . . . But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons. I think when it is once clear that the main purpose of the defendants could be completely carried out without recourse to the power of moving the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons. Of course, being merely a creature of statute they cannot exercise powers if the statute has not conferred them; but it does not follow that they are bound to use them because they possess them any more than a private person would be. They merely fall under the general principle *sic utere tuo ut alienum non lædas*."

(*l*) (1898) 2 Ch. 610—612.(*m*) Metropolis Management Act, 1855.

Chap. VI.
Sect. 1.

Nuisances
by public
companies.

In a case in which a railway company was proceeding to erect an arch over a mill race for the purpose of sustaining an embankment on which the railway was to be constructed, and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the company from making an arch of less than certain specified dimensions (*n*). The 16th clause of the Railways Clauses Consolidation Act (*o*), which authorises various works to be executed, contains a proviso that in the exercise of their powers the company shall do as little damage as can be. This proviso does not apply to what is to be done in the execution of the powers, but to the *manner* of doing it (*p*).

As long as a company keep within their statutory powers, no action can be maintained against them for any act done in the exercise of their statutory authority, however injurious it may be to the property of others, provided the injury done is the necessary and inevitable result of the exercise of the statutory powers, and provided the works have been executed with proper skill and care, and in such a way as to cause no unnecessary injury to private rights (*q*). It is clearly settled that the power to take defined lands compulsorily and to make a line of railway thereon, and to use locomotives upon that line, entitles a railway company to run locomotives thereon, notwithstanding that in so doing they are causing what in the absence of such powers would be an actionable nuisance; and persons whose properties are injured by vibration, sparks, noise, or smoke incident to the proper use and working of the railway, cannot bring an action for nuisance (*r*). Where a

(*n*) *Coats v. Clarence Railway Co.*, 1 Russ. & M. 181, 32, R. R. 183; and see *Manser v. Northern and Eastern Railway Co.*, 2 Ba. Ca. 380; *Stainton v. Woolrych*, 23 B. 234.

(*o*) 8 Vict. c. 20.

(*p*) *Reg. v. East and West India Docks Railway Co.*, 2 E. & B. 466, 474, *ante*, p. 104.

(*q*) *Hammersmith Railway Co. v. Brand*, L. R. 4 H. L. 196; *East Freemantle Corporation v. Annois*, 85 L. T. 732.

(*r*) *Ib.*; *Jones v. Stanstead, &c., Railway Co.*, L. R. 4 P. C. 117; *London, Brighton, and South Coast Railway Co. v. Truman*, 11 A. C. 45; *Att.-Gen. v. Metropolitan Rail-*

company causes a nuisance by the exercise of powers in pursuance of a Provisional Order of the Board of Trade, it is protected in the like manner as in the case of the exercise of other statutory powers (s).

Chap. VI.
Sect. 1.

Where a thing may be done under statutory powers in one of two ways, one of which is injurious to private rights, and the other is not, it must as a rule be done in a manner which will not be injurious (t). If, moreover, statutory powers are conferred under circumstances in which the powers may be exercised without in themselves causing a nuisance, and new and unforeseen circumstances render the exercise of the powers impossible without a breach of the law, these powers cannot be exercised without making the parties liable (u).

If, however, the Act necessarily requires something to be done which cannot be done without creating a nuisance, or if, as to those things which may or may not be done under it, there is evidence on the face of the Act that the legislature supposed it impossible to be done somewhere and under some circumstances without creating a nuisance, an action will not lie (x). Where, however, the terms of a statute are not imperative, but only permissive, and it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in

way Co., (1894) 1 Q. B. 384 (C. A.); *Harrison v. Southwark, &c.*, *Water Co.*, (1891) 2 Ch. 469; *Canadian Pacific Railway v. Roy*, 86 L. T. 127. A different rule applies in the case of a nuisance caused by a gas company, the Gasworks Clauses Act expressly providing that a company is to be liable for private nuisance committed in the construction of the works as well as in the manufacture of gas. See *Jordeson v. Sutton, &c.*, *Gas Co.*,

(1898) 2 Ch. 614, (1899) 2 Ch. 218 (C. A.).

(s) *National Telephone Co. v. Baker*, (1893) 2 Ch. 186.

(t) *Fenwick v. East London Railway Co.*, 20 Eq. 544; *Norton v. London and North Western Railway Co.*, 9 C. D. p. 633.

(u) *Queen v. Bradford Navigation Co.*, 6 B. & S. 631.

(x) *Metropolitan District Asylum v. Hill*, 6 A. C. 193.

Chap. VI.
Sect. 1.

any place which might be selected for the purpose (y). In other words, where the statutory power is permissive and not imperative, the legislature must be held to have intended that its exercise is not to be in prejudice of the common law rights of others (z).

In *Gas Light and Coke Co. v. Vestry of St. Mary Abbots, Kensington* (a), the plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the street and houses in the street. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers used were so heavy as to injure occasionally the plaintiffs' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair, if such rollers had been used. It was held that plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs.

"The authorities show," said the Court (b), "that an action lies for an injury to property unless such injury is expressly authorised by statute or is physically speaking the necessary consequence of what is so authorised. If in this case the defendants were expressly authorised by statute to use steam rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiff would have no ground of complaint. The case would be one of *damnum absque injuria*. The same consequences would follow if the defendants were expressly authorised by statute to repair in some way which necessarily

(y) *Metropolitan District Asylum v. Hill*, 6 A. C. 193; *Canadian Pacific Railway Co. v. Parke*, (1899) A. C. 535, 545.

(z) *Canadian Pacific Railway Co. v. Parke*, (1899) A. C. p. 545.

(a) 15 Q. B. D. 1 (C. A.).

(b) *Ib.*, p. 5.

required the use of heavy steam rollers or other machinery which could not be worked without injuring the plaintiffs' pipes, there again, although such rollers or machinery were not expressly mentioned, their use would be authorised by necessary implication and the plaintiffs would be without redress. But unless some such statutory enactment can be shown to authorise the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress."

The burden of proving that the creation of a nuisance will be the inevitable result of carrying out the direction of the legislature lies on the persons seeking to justify the nuisance. If the order of the legislature can be implemented without nuisance, they cannot plead the protection of the statute; and on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance (c). Onus of proof.

Where injury to private rights results from the construction of works which have been authorised by statute and which have been executed with proper skill and care, the party injured must look for his remedy to the proviso for compensation, if any, within the statute which authorises the works (d). If there be no provision for compensation in the statute, the party injured is without a remedy (e). Compensation.

The statutory tribunal, however, is only established to give compensation for losses sustained in consequence of what the incorporated company may do lawfully under the powers which the legislature has conferred on them. For anything done in excess of those powers or contrary to what the legislature in conferring those powers has commanded, the proper remedy is by action (f).

(c) *Metropolitan Asylum District v. Hill*, 6 A. C. 193, 213; see *Sellors v. Matlock Local Board of Health*, 14 Q. B. D. 929.

(d) *Hammersmith Railway Co. v. Brand*, L. R. 4 H. L. 171; *Kirby v. School Board for Harrogate*, (1896) 1 Ch. 437; *Manchester, Sheffield, and Lincolnshire Railway Co. v. Henslerson*, (1898) 2 Ch. 394

(C. A.); *Jordeson v. Sutton, &c., Gas Co.*, (1898) 2 Ch. p. 621; *Long Eaton Recreation Grounds Co. v. Midland Railway Co.*, (1902) 2 K. B. 574 (C. A.).

(e) *Hammersmith Railway Co. v. Brand*, L. R. 4 H. L. p. 202; *Att.-Gen. v. Metropolitan Railway Co.*, (1894) 1 Q. B. 384 (C. A.)

(f) *Caledonian Railway Co. v.*

Chap. VI.
Sect. 1.

Compensation
need not be
tendered before
commencement
of works.

Compensation
clauses do not
apply to the case
of lands perma-
nently occupied.

A public company, when acting in conformity with its statutory powers, need not, before commencing works which may injuriously affect lands, make or tender compensation for the conjectural damage (*g*).

Where the injury to lands from the works of a public company is of so permanent a character as distinguished from mere damage as to amount to a permanent occupation of them, the provisions for compensation in respect of land injuriously affected contained in the 68th section of the Lands Clauses Act, 8 Vict. c. 18, do not apply. The case becomes one of destructive trespass, and will be restrained as such (*h*). The defendants in *Ware v. Regent's Canal Co.* (*i*) having certain powers to construct a reservoir and raise the water to a certain height, the plaintiff applied for an injunction to restrain the company from doing damage to his land by flooding. Lord Chelmsford drew the distinction between works causing an occasional damage by flooding and works causing a permanent submerging of land. "The question," he said, "arises, what would be the rights and liabilities of the company in thus going to the extreme limits of their powers? The effect would be to permanently cover with water other lands than those which they have already purchased and taken, which they have the power to take under their Act. If this had taken place during the period when the compulsory powers of the company could have been exercised, I apprehend that the plaintiff might have obtained relief through the aid of a Court of Equity, and have compelled the company to take these additional lands. But if lands which they have no power to take, or, after the compulsory powers had ceased, lands which they had the power to take but had not taken, were permanently flooded, there can be no doubt that the plaintiff might have

Colt, 3 Macq. 833; *Reg. v. Darlington Board of Health*, 6 B. & S. 562; *Imperial Gas Co. v. Broadbent*, 7 D. M. & G. 459, 7 H. L. C. 600; and see *ante*, p. 126.

(*g*) *Hutton v. London and South Western Railway Co.*, 7 Ha. 259;

Macey v. Metropolitan Board of Works, 33 L. J. Ch. 377; see *Clark v. School Board of London*, 9 Ch. 120.

(*h*) See *Ware v. Regent's Canal Co.*, 3 D. & J. 212, 227.

(*i*) 3 D. & J. 212.

obtained an injunction to restrain the permanent occupation of his land " (k).

Chap. VI.
Sect. I.

By the 68th clause of the Lands Clauses Act, 8 Vict. c. 18, it is provided that if any party shall be entitled to compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the undertakers shall not have made compensation, it shall be assessed in the manner therein mentioned. The Court will not restrain by injunction proceedings for an assessment of compensation under the Act, but will leave the question of the right to compensation to be decided in an action on the award (l). If, however, there is an original equity affecting the claim, the Court will interfere. "Where there is an original equity affecting the claim," said Turner, L. J., in *Duke of Norfolk v. Tennant* (m), "the statute does not take it away. It is, I think, as much the duty of this Court to interpose by injunction in such cases as in the ordinary attempt to put in force the powers of the Act for compulsory purchase, where the purchase has been the subject of contract." Where accordingly there had been some treaty for compensation for damage with a landowner which had not been completed or carried out, but there was evidence to show that he had received consideration for an agreement which he refused to perfect, the Court restrained him from taking proceedings to obtain compensation under the clause (n).

Landowner not bound to prove damage before seeking compensation under the 68th clause.

But if there is an original equity affecting the claim, the statute does not take it away.

The principles upon which the Court proceeds in restraining nuisance on the part of incorporated companies are also applicable to nuisance on the part of public bodies incorporated by Act of Parliament for a public purpose and for the promotion of the benefit of the community (o). Inasmuch as these bodies

Nuisance by public bodies.

(k) 3 D. & J. p. 226.

(l) *East and West India Docks v. Gattike*, 3 Mac. & G. 155; *London and Blackwall Railway Co. v. Cross*, 31 C. D. p. 367; *Brierley Hill Local Board v. Pearsall*, 11 Q. B. D. 735, 11 A. C. 595.

(m) 9 Ha. 748.

(n) *Duke of Norfolk v. Tennant*,

9 Ha. 745. See *London and South Western Railway Co. v. Coward*, 5 Ra. Ca. 715; *Maunsell v. Midland Great Western of Ireland Railway Co.*, 1 H. & M. 130.

(o) *Frewin v. Lewis*, 4 M. & C. 249; 48 R. R. 88; see *ante*, pp. 85, 86.

Chap. VI.
Sect. 1.

are acting on behalf of the public interest, the Court is disposed to assume that what they do, provided it be within the statutory powers, is a fair exercise of the discretion which has been reposed in them by the legislature (*p*), and will not interfere with them in the exercise of the powers given to them by statute so long as they do not conduct themselves in an arbitrary or oppressive manner, and do not appear to be actuated by corrupt or improper motives (*q*). But in the absence of an express power to create a nuisance, a public body executing drainage or other works for the benefit of their district are bound to exercise their powers so as not to create a nuisance (*r*). The fact that a large population may suffer unless the rights of an individual are invaded cannot be taken into consideration by the Court (*s*).

If a public body is transgressing the powers which have been conferred on it by the legislature, or is doing an illegal act which in its nature tends to the injury of the public, it is not necessary on information by the Attorney-General to prove that injury to the public will result from the act complained of (*t*).

In a recent case, a railway company was by its Act, which incorporated the Railways Clauses Act, 1845, empowered to carry the railway across a turnpike road on the level. The company constantly drove trains over the level crossing at a speed exceeding four miles an hour in breach of the provisions of sect. 48 of the Railways Clauses Act. On an information filed

(*p*) See *Foster v. Hornsby*, 2 Ir. Ch. 445; *Crossman v. Bristol and South Wales Railway Co.*, 1 H. & M. p. 542; *Att.-Gen. v. Great Eastern Railway Co.*, 6 Ch. p. 576.

(*q*) *Stainton v. Woolrych*, 23 Beav. 225; *Att.-Gen. v. Metropolitan Board of Works*, 1 H. & M. p. 315; *Biddulph v. St. George's Vestry*, 3 D. J. & S. 493; *Grand Junction Railway Co. v. Shugar*, 6 Ch. 488.

(*r*) *Att.-Gen. v. Leeds Corporation*, 5 Ch. 583; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146; *Att.-Gen. v. Gas Light and Coke Co.*, 7 C. D. 217; *Shelfer v. City of*

London Electric Lighting Co., (1895) 1 Ch. 287 (C. A.); *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217 (C. A.).

(*s*) *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 528; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. pp. 154, 155. Comp. *Raphael v. Thames Valley Railway Co.*, 2 Ch. 147.

(*t*) *Att.-Gen. v. Cockermonth Local Board*, 18 Eq. 172; *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 C. D. 752; *Att.-Gen. v. London and North Western Railway Co.*, (1899) 1 Q. B. 72; (1900) 1 Q. B. 78 (C. A.).

by the Attorney-General the company set up as a defence that there was no proof of any injury occasioned to the public by the company's non-observance of the provisions in question, and that the inconvenience caused to the public by the existence of the level crossing would be increased if the company complied with sect. 48 of the Railways Clauses Act. It was held, however, that the information being filed by the Attorney-General to enforce the express provisions of a statute, the Court could not entertain the question of whether injury to the public was in fact occasioned by the non-compliance with the statute, and that the injunction must therefore be granted (u).

Where a plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to inquire in what manner the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to (x). But where the difficulty of removing the injury is great, the Court will suspend the operation of an injunction for a time with liberty to the defendant to apply for an extension of time (y).

The Court will not make an order against a public body or against an individual to do an act, unless it is satisfied that it is within their or his power to do it (z).

It seems that a Board of Health ought not to come to the Boards of health. Court for an injunction unless a special case can be made out, inasmuch as such bodies have a proper remedy under the provisions of the Public Health Act (a). But on a proper

(u) *Att.-Gen. v. London and North Western Railway Co.*, (1899) 1 Q. B. 72; (1900) 1 Q. B. 78 (C. A.).

(x) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146, 154.

(y) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 154; *Islington Vestry v. Hornsey District Council*, (1900) 1 Ch. 706, 707 (C. A.).

(z) *Att.-Gen. v. Guardians of Dorking*, 20 C. D. 606, 607, *per* Jessel, M. R.; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. p. 154; *Evans v. Manchester, &c., Railway Co.*, 36 C. D. 639.

(a) *Felkin v. Herbert*, 11 L. T. N. S. 173; *Mayor of Devonport v. Tozer*, (1902) 2 Ch. 182.

case being made out a local Board of Health may have an injunction to restrain a nuisance; and it is no answer to an information at the relation of a local Board of Health to abate a nuisance arising from sewage that the board has power itself to remedy the evil by making sewers, because it is the duty of the board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works (b).

Actions to restrain nuisance have been entertained against Boards of Health (c). A local board has not, in the absence of express enactment or agreement, any higher right than an individual landowner to discharge sewage into the sewers belonging to the sanitary authority of another district (d). But a local authority may discharge surface water into a natural stream, or watercourse, or canal, on land belonging to another person within their district (e). Any damage caused by the proper exercise of such right is a matter for compensation, and forms no ground for an injunction (f).

The provisions of the Metropolis Management Act, 25 & 26 Vict. c. 102, s. 106 (g), and the Public Health Act, 1875, s. 264 (g), requiring one month's notice to be served before instituting proceedings, have been held not to apply where the principal object of the action is to obtain an injunction to restrain an immediate injury (h). Moreover, where an action

(b) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 147.

(c) *Grand Junction Canal Co. v. Shugar*, 6 Ch. 483; *Att.-Gen. v. Cockermouth Local Board*, 18 Eq. 172; *Roberts v. Gwyrfai District Council*, (1899) 2 Ch. 608 (C. A.); *Baron v. Portslade District Council*, (1900) 2 Q. B. 588 (C. A.). In *Hardinge v. Southborough Local Board*, W. N. (1875) 78, an injunction was granted where all the members of the local board had resigned.

(d) *Att.-Gen. v. Acton Local Board*, 22 C. D. 221; and see *Islington Vestry v. Hornsey District Council*, (1900) 1 Ch. 695 (C. A.).

(e) *Durrant v. Branksome Urban Council*, (1897) 2 Ch. 291 (C. A.); and see *Croysdale v. Sunbury-on-Thames Urban Council*, (1898) 2 Ch. 515, 520.

(f) (1897) 2 Ch. p. 305; *Croysdale v. Sunbury-on-Thames Urban Council*, (1898) 2 Ch. 515, 520.

(g) Repealed by the Public Authorities Protection Act, 1893.

(h) *Flower v. Local Board of Health for Low Leyton*, 5 C. D. 347 (C. A.); *Att.-Gen. v. Hackney Board of Health*, 20 Eq. 626; *Sellers v. Matlock Local Board*, 14 Q. B. D. 929; *Bateman v. Poplar District Board*, 33 C. D. 361.

was *bonâ fide* brought to obtain an injunction against a sanitary authority, and at the trial the Court considered that an injunction was not then needed, it was held that there was jurisdiction to award damages in lieu of an injunction, in spite of the fact that the notice of action required by sect. 264 of the Public Health Act, 1875, had not been given (i).

Chap. VI.
Sect. 1.

Bills to restrain nuisance have been entertained against the following other public functionaries, namely :—Commissioners of Sewers (k); Justices of the Peace (l); Drainage Commissioners (m); Commissioners of Woods and Forests (n); Conservators of Thames (o); Trustees of Turnpike Roads (p); Visitors of a Lunatic Asylum (q); the Secretary at War (r); the Metropolitan Board of Works (s); a District Board of Works (t); a Highway Board, constituted under 5 & 6 Will. 4, c. 50, acting as a local authority for carrying out the provisions of the Nuisances Removal Act, 18 & 19 Vict. c. 121 (u); a corporation acting under Local Government Act, 21 & 22 Vict. c. 98 (x).

Other public
functionaries.

Where the legislature has pointed out a special tribunal for determining a question, the Court ought not, as a general rule, to restrain proceedings before such tribunal (y); but where the

(i) *Chapman v. Auckland Union*, 23 Q. B. D. 294 (C. A.).

(k) *Box v. Allen*, 1 Dick. 49; *Birley v. Constables of Chorlton-on-Medlock*, 3 B. 499.

(l) *Att.-Gen. v. Forbes*, 2 M. & C. 123, 45 R. R. 15.

(m) *Earl of Ripon v. Hobart*, 3 M. & K. 169, 41 R. R. 40; *Dawson v. Paver*, 5 Ha. 415.

(n) *Squire v. Campbell*, 1 M. & C. 459, 43 R. R. 231.

(o) *Att.-Gen. v. Johnson*, 2 Wils. C. C. 87, 18 R. R. 156; *Att.-Gen. v. Conservators of Thames*, 1 H. & M. 1.

(p) *Weeks v. Heward*, 10 W. R. 557.

(q) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 147.

(r) *Felkin v. Herbert*, 4 L. T. N. S. 433, 30 L. J. Ch. 604, 11

L. T. N. S. 173; *Hawley v. Steele*, 46 L. J. Ch. 782.

(s) *Att.-Gen. v. Metropolitan Board of Works*, 1 H. & M. 320; *Macey v. Metropolitan Board of Works*, 33 L. J. Ch. 377.

(t) *Bateman v. Poplar District Board*, 37 C. D. 272.

(u) *Att.-Gen. v. Richmond*, 2 Eq. 306.

(x) *Ellis v. Corporation of Bridgnorth*, 2 J. & H. 67. See *Reg. v. Darlington Board of Health*, 5 B. & S. 515. See as to Inclosure Commissioners, *Dawson v. Paver*, 5 Ha. 415; *Turner v. Blamire*, 1 Drew. 409; *Harris v. Jose*, 14 W. R. 303; *Earl Beauchamp v. Darby*, 1 W. N. 308.

(y) See *Stannard v. Vestry of St. Giles*, 20 C. D. 190 (C. A.); and see

Chap. VI.
Sect. 1.

Delay and
acquiescence.

question has come before the Court in independent proceedings in which it is necessary to decide the whole matter between the parties, the Court may it seems in such a case restrain the proceedings by injunction in order to save expense (z).

A man who comes to the Court for relief by interlocutory injunction against nuisance must show due diligence in making the application. Whatever may have been the original equity of his case, if he has by his conduct encouraged another to expend monies or alter his condition in contravention of the rights for which he contends, he has deprived himself of his equity to the interference of the Court (a). It is not sufficient in order to negative acquiescence to show that the plaintiff gave notice that he objected, and threatened proceedings (b). All the circumstances must be considered (c). Accordingly a lord of a manor claiming as against the tenants the right of property in the mines within the manor, who had stood by for a long period and allowed the tenants without objection to expend large sums of money in working the mines, was held precluded by his conduct from relief in equity (d). So also a man who had acquiesced for eighteen months in the deviation of part of a navigable river, and in the obstruction of a road by a railway company, was held precluded from relief (e). So also a man who did not file his bill until two years and a half after the works complained of as throwing flood-water over his lands were completed, was held precluded from relief (f). So also a man who had permitted the owner of the adjoining premises to rebuild them to a greater height than they were before, and to alter his ancient lights and to open new ones (the work

also *Grand Junction Waterworks Co. v. Hampton District Council*, (1898) 2 Ch. 331. Cf. *Att.-Gen. v. Guardians of the Poor of the Merthyr Tydfil Union*, (1900) 1 Ch. 516, 550 (C. A.)

(z) *Stannard v. Vestry of St. Giles*, 20 C. D. 190 (C. A.); but see *Grand Junction Waterworks Co. v. Hampton District Council*, (1898) 2 Ch. 331; *Mayor of Devonport v. Tozer*, (1902) 2 Ch. 182.

(a) *Ante*, p. 16; and see *Parrott v. Palmer*, 3 M. & K. 632, 41 R. B. 149; *Wicks v. Hunt*, John. 380; *Cotching v. Bassett*, 32 L. J. Ch. 286.

(b) *Wicks v. Hunt*, John. 372.

(c) *Bankart v. Houghton*, 27 B. 425.

(d) *Parrott v. Palmer*, 3 M. & K. 632, 41 R. B. 149.

(e) *Illingworth v. Manchester and Leeds Railway Co.*, 2 R. B. Ca. 188.

(f) *Wicks v. Hunt*, John. 380.

being done under the inspection of the defendant's surveyor), was held not entitled to interrupt the lights after the work was completed (*g*).

Chap. VI.
Sect. 1.

If the question as to nuisance is one which admits of a determination prospectively, a man should not delay in coming to the Court. If he abstains from coming until the mischief is actually done, he may be told he is too late (*h*). If the act complained of is caused by a public company in the execution and construction of their works, it is more incumbent on the party injured to apply without delay, than in ordinary cases (*i*). Much, however, depends on the nature and character of the nuisance.

Though a stronger case of delay is required to affect those who assert a public right, than when a private right alone is in dispute (*ii*), delay, even in such cases, is not without effect (*k*). But the peculiar circumstances of the case may often account for and excuse the delay (*l*). In the case of a gradually increasing nuisance the Court will have regard to the nature of the nuisance, and conclude that the relators have been waiting to see whether the nuisance will continue to grow, or whether circumstances may not of themselves arise which will check or diminish it (*m*). If the public have been slow in complaining, their delay is a proper subject for the consideration of the Court in fixing the amount of time to be allowed for carrying the injunction into effect (*n*).

An injunction being an order directed to a person (*o*), does not run with the land. Where, therefore, after a perpetual

Injunction does
not run with
the land.

(*g*) *Cotching v. Bassett*, 32 Beav. 101. See *McManus v. Cooke*, 35 C. D. p. 696, and see *Davies v. Marshall*, 10 C. B. N. S. 703, 1 Dr. & Sm. 557.

(*h*) *Dawson v. Paver*, 5 Ha. 415, 430.

(*i*) *Ante*, p. 16.

(*ii*) See *Islington Vestry v. Hornsey Urban Council*, (1900) 1 Ch. 695 (C. A.).

(*k*) *Att.-Gen. v. Johnson*, 2 Wils. C. C. 87, 102, 18 R. R. 156; *Att.-*

Gen. v. Sheffield Gas Co., 3 D. M. & G. 311; *Islington Vestry v. Hornsey Urban Council*, *ante*.

(*l*) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146, 160.

(*m*) *Att.-Gen. v. Proprietors of Bradford Canal*, 2 Eq. 71; *Att.-Gen. v. Leeds Corporation*, 5 Ch. 594.

(*n*) *Att.-Gen. v. Proprietors of Bradford Canal*, 2 Eq. 71; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 160.

(*o*) *Ante*, p. 10.

Chap. VI.
Sect. 2.

injunction had been obtained against a sanitary authority restraining it from polluting a river a Provisional Order was made constituting a new and larger drainage board, it was held that the persons who had obtained the injunction against the old sanitary authority could not enforce it against the new board. If the new drainage board continued the nuisance, or failed to take effectual steps to remedy it, a new action would have to be brought (*p*).

Appeal from
Court below.

In cases of nuisance, unless it plainly appears that the conclusion of the Court below upon the evidence was wrong, the Appeal Court is unwilling to re-open the investigation by directing an issue or employing experts to report (*q*).

SECTION II.—NUISANCE TO DWELLING-HOUSES AND HOUSES OF BUSINESS.

THE foundation of the jurisdiction of the Court by injunction in the case of nuisance to dwelling-houses or houses of business is such a degree of injury to property as interferes materially with its comfort and enjoyment either for domestic purposes or for the purposes of business. If the house is a dwelling-house, the rule or standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief is the comfort and enjoyment in their abode to which the inmates are reasonably entitled (*r*), and this must be estimated according to the plain and simple notions entertained by persons in ordinary life, and not according to those held by persons accustomed to elegant and dainty habits of living (*s*). If the house is a manufactory or place of business, the rule or standard is damage of such an amount as to render it to a material extent less suitable for the purposes of business (*t*).

(*p*) *Att.-Gen. v. Birmingham, &c., Drainage Board*, 17 C. D. 685 (C. A.).

(*q*) *Salvin v. North Brancepeth Coal Co.*, 9 Ch. 711, 715.

(*r*) *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275, 284; *Kelk v. Pearson*, 6 Ch. p. 811; *Fleming v. Hislop*, 11 App. Ca. 691.

(*s*) *Walter v. Selfe*, 4 De G. & S. 322, *per* Knight Bruce, L. J.; *Soltau v. De Held*, 2 Sim. N. S. p. 159; *Kelk v. Pearson*, 6 Ch. 811.

(*t*) *Jackson v. Duke of Newcastle*, 3 D. J. & S. 284, *per* Lord Westbury; *Yates v. Jack*, 1 Ch. 295; *Martin v. Headon*, 2 Eq. 433; *City*

The action is usually brought by the occupier; but where the house is unoccupied, the owner may sue on the ground of damage to his property. If the house is inhabited, the owner may sue either alone or conjointly with the occupier (*u*). Where the house is inhabited, and the person suing is the owner, the Court will in general look for evidence from the tenant in support of the allegation of nuisance (*x*).

Chap. VI.
Sect. 2.
Who may sue.

One of the nuisances to houses which most frequently calls for the interference of the Court is the setting up by one man of erections on his land so as to obstruct the passage of light and air to the windows of his neighbour. It is not every impediment to the access of light and air which will warrant the interference of the Court by injunction, or even entitle the party alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, in respect of such an impediment, some material injury must be established (*y*). The rule at law as to the amount of obstruction which is actionable has been thus laid down by Lord Wynford in *Back v. Stacey* (*z*):—"To constitute an illegal obstruction of light by building it is not sufficient that the plaintiff has less light than before, or that the part of his house principally affected cannot be used for all the purposes to which it might otherwise have been applied. In order to give a right of action there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done" (*a*). Ancient lights.

of *London Brewery Co. v. Tennant*, 9 Ch. 217; *Ecclesiastical Commissioners v. Kino*, 14 C. D. 228.

(*u*) *Wilson v. Townend*, 1 Dr. & Sm. 324; *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275, 283.

(*z*) *Cleeve v. Mahany*, 9 W. R. 882. See *Radcliffe v. Duke of Portland*, 3 Giff. 702; *Curriers' Co. v. Corbett*, 4 D. J. & S. 764, 771.

(*y*) *Johnson v. Wyatt*, 2 D. J. & S. 18; see the judgment of Turner,

L. J., in this case; *Curriers' Co. v. Corbett*, 4 D. J. & S. 770; *Robson v. Whittingham*, 1 Ch. 442.

(*z*) 2 Car. & P. 465, 31 B. R. 679.

(*a*) *Dent v. Auction Mart Co.*, 2 Eq. 245; *Aynsley v. Glover*, 18 Eq. 552; *Kino v. Rudkin*, 6 C. D. 165; *Ecclesiastical Commissioners v. Kino*, 14 C. D. 224, per Lord Esher; see *Home and Colonial Stores, Ltd.*, v. *Colls*, (1902) 1 Ch. 302 (C. A.).

Chap. VI.
Sect. 2.

It is not, moreover, in every case in which an action can be maintained at law for the obstruction of light that an injunction will be granted by the Court. If the injury caused by the abridgment of light is capable of being properly and adequately compensated by damages, the Court may decline to interfere by injunction (*b*). Practically, however, there is little difference with respect to light in the amount of damage which would entitle a man to maintain an action for damages and an action for an injunction (*c*).

When an
injunction will
be granted.

Whether or not the injury complained of is substantial enough for the interference of the Court is a question which must in each case depend on the particular circumstances of the case. It is impossible to find any precise standard by which to determine the amount of light necessary to induce the Court to exercise its protective jurisdiction. Each case must depend on evidence whether there has been a substantial reduction of the quantity of light which the owner of the house has a right to enjoy (*d*). It is not the law that there is a certain quantity of light which a man is entitled to and which is sufficient for him, and that the question is whether he has been deprived of that quantity of light. It is essentially a question of comparison whether by reason of the deprivation of light, the house is substantially less comfortable than it was before (*e*). There is no distinction in regard to the right to light between town houses and country houses (*f*). A greater amount of evidence is needed to prove injury to light by lateral or oblique obstruction, than is necessary in case of direct obstruction; more especially when the buildings to the side are not erected upon what was previously an open space, but upon a space already to a great extent obstructed with buildings (*g*).

(*b*) *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275, 283; *Jacomb v. Knight*, *ib.* 533; *Kelk v. Pearson*, 6 Ch. 814.

(*c*) *Leech v. Schweder*, 9 Ch. p. 476, *per Mellish*, L. J.

(*d*) *Calcraft v. Thomson*, 15 W. R. 387; *Staight v. Burn*, 5 Ch. 166.

(*e*) *Kelk v. Pearson*, 6 Ch. 814;

Warren v. Brown, (1902) 1 K. B. 15 (C. A.).

(*f*) *Dent v. Auction Mart Co.*, 2 Eq. 238; *Martin v. Headon*, *ib.* 425.

(*g*) *Clarke v. Clark*, 1 Ch. 16, 20; *City of London Brewery Co. v. Tennant*, 9 Ch. 212, 220; *Kino v. Rudkin*, 6 C. D. 161.

It is not necessary in order to entitle a man to relief, that a present existing injury should be shown, and it is no defence to say that the plaintiff has sufficient light for his present business (*h*). There is no standard of the light ordinarily required by a house for the purposes of habitation or business, and if there is an obstruction which causes diminution of light, such as to cause substantial damage to the owner or tenant, that is an interference which entitles the plaintiff to relief though the house may be no worse lighted than the majority of houses in the neighbourhood, or may have abundant light for all ordinary purposes of habitation or business (*i*). The defendant must be able to show that for whatever purpose his neighbour may wish to employ the light there would be no material interference with it (*j*). The quantity of light a man has a right to receive, is as much a part of his property as his house, and requires equally the protection of the Court (*k*). The fact that the plaintiff may have obscured in an insignificant or partial degree his own windows, does not deprive him of the right to restrain another person from erecting a building so as seriously to diminish the supply of light (*l*). Nor is it any answer to say, if a man's ancient lights be interrupted, that there are remedies which he can provide for himself by making changes in his own house (*m*).

Chap. VI.
Sect. 2.

When an
injunction will
be granted.

In determining whether there has been a substantial interference with light, judges in the Chancery Division have sometimes relied too much on the provision as to 45 degrees contained in the Metropolis Management Act, 1862 (*n*). The

The angle of 45
degrees.

(*h*) *Yates v. Jack*, 1 Ch. 295; (*k*) *Martin v. Headon*, 2 Eq. 434; *Aynsley v. Glover*, 18 Eq. 548; *Scott v. Pape*, 31 C. D. 554.

Moore v. Hall, 3 Q. B. D. 178. (*l*) *Arcedeckne v. Kelk*, 2 Giff.

(*i*) *Warren v. Brown*, (1902) 1 K. B. 15 (C. A.); approving *Kelk v.* 683; *Baxter v. Bower*, 44 L. J. Ch. 625.

Pearson, 6 Ch. 809, 814, and disapproving *Lanfranchi v. Mackenzie*, 4 Eq. 421, and *Dickinson v. Harbottle*, 28 L. T. 186. (*m*) *Dent v. Auction Mart Co.*, 2 Eq. 250; *Mackey v. Scottish Widows Insurance Co.*, 1 R. 11 Eq. 541.

(*j*) *Yates v. Jack*, 1 Ch. 295; *Aynsley v. Glover*, 548; *Warren v. Brown*, (1902) 1 K. B. 15 (C. A.). (*n*) 25 & 26 Vict. c. 102, s. 85, repealed, but in substance re-enacted by the London Building Act, 1894, s. 49.

Chap. VI.
Sect. 2.

provision as to 45 degrees in this Act was intended to deal with the width of streets, and was not intended to lay down any rule applicable to the light which a man is entitled to enjoy in the city of London. There is no conclusion of law that a building will not obstruct the light coming to a window, if it permits the light to fall on the window at an angle of not less than 45 degrees from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case (o). There is no rule of law that a man may build up to an angle of 45 degrees, and, *quere*, whether such a rule could be considered even as a rough measure of the rights of the owner of ancient lights, but in judging of the probable effect of a proposed building the Court may not unreasonably regard the fact that an angle of 45 degrees will be left as *primâ facie* evidence that there will be no substantial interference and may require this presumption to be clearly rebutted by satisfactory evidence (p).

London Building
Act, 1894.

The Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, ss. 83, 85, which gave "a right to the building owner to raise any party structure permitted by this Act to be raised upon condition of making good all damage occasioned thereby to the adjoining premises," was held not to authorise the raising of a structure so as to obstruct ancient lights in the adjoining premises (q). This Act has been repealed, and in substance re-enacted by the London Building Act, 1894, sect. 101 of which provides that "nothing in this Act shall authorise any interference with an easement of light, or other easements in or relating to a party wall."

An injunction—
when not
granted.

The shutting out a pleasant prospect (r), the erection of disagreeable objects in view (s), or the invasion of a man's privacy

(o) *Ecclesiastical Commissioners v. Kino*, 14 C. D. p. 228 (C. A.); *Parker v. Avenue Hotel Co.*, 24 C. D. 282 (C. A.).

(p) *Home and Colonial Stores v. Colls*, (1902) 1 Ch. 302.

(q) *Crofts v. Haldane*, L. R. 2 Q. B. 194; *Bourke v. Alexandra Hotel Co.*, 25 W. R. 393, W. N. (1877) 157.

(r) *Aldred's case*, 9 Co. R. 58 a.; *Att.-Gen. v. Doughty*, 2 Ves. Sen. 453; see *Dalton v. Angus*, 6 App. Ca. 798, 824.

(s) *Att.-Gen. v. Doughty*, 2 Ves. Sen. 453; *Potts v. Smith*, 6 Eq. 315. See *Roderick v. Aston Local Board of Health*, 5 C. D. 328, where it was held that a Local Board of Health

by the opening of a window looking over his grounds (*t*), give no right of action. Nor will the erection of buildings which prevent goods displayed in a shop from being seen from places where they would previously have been seen (*u*).

Chap. VI.
Sect. 2.

If the right at law, and the invasion of that right be clear and free from doubt, the Court may interfere at once, and grant an injunction *simpliciter* (*x*); but if either the right at law, or the fact of its violation is not free from doubt, the Court will have regard to the comparative convenience or inconvenience of granting or withholding the injunction (*y*). In such a case, if on the balance of convenience and inconvenience it appear that the granting an injunction would be inflicting a great and disproportionate injury on the defendant, the motion will be ordered to stand over upon defendant undertaking to alter the building or otherwise deal with it, as the Court shall direct, if the right at law should prove to be in favour of the plaintiff (*z*). If on the other hand the Court shall be of opinion that the balance of convenience is in favour of granting an injunction rather than of allowing the defendant to complete his building with an undertaking to pull it down if required, an injunction will issue (*a*).

Principles on
which the Court
interferes.

It is not the practice of the Court on motion for an injunction to appoint a surveyor to report to the Court at the trial of the action as to whether the windows of the plaintiff have been in fact obscured by the buildings of the defendant (*b*). But if at the trial (or on motion for an injunction by consent treated as the trial) the Court finds difficulty in ascertaining from the evidence the amount of the injury, it will appoint a surveyor to make a report (*c*). In a case where the Court was

Appointment of
surveyor.

might under the Public Health Act, 1875, erect a sewer above ground.

(*t*) *Chandler v. Thompson*, 3 Camp. 80, 13 R. B. 756; *Turner v. Spooner*, 30 L. J. Ch. p. 803; and cf. *Re Penny and the South Eastern Railway Co.*, 7 El. & Bl. 660.

(*u*) *Smith v. Owen*, 35 L. J. Ch. 317, W. N. (1866) 49; *Butt v. Imperial Gas Light Co.*, 2 Ch. 158.

(*x*) *Potts v. Levy*, 2 Drew. 272.

See as to form of order for injunctions, *Jacobs v. M'Sheehan*, W. N. (1877) 86.

(*y*) See *ante*, pp. 20, 21, 84.

(*z*) *Smith v. Elger*, 3 Jur. 790; *ante*, pp. 20, 21.

(*a*) *Newson v. Pender*, 27 C. D. 43.

(*b*) *Baltic Co. v. Simpson*, 24 W. R. 390.

(*c*) *Kelk v. Pearson*, 6 Ch. 810.

Chap. VI.
Sect. 2.

What passes by
grant. Implied
grant of lights.

not satisfied from the evidence whether the act proposed to be done by the defendant would or would not be a material obstruction to the plaintiff's light, the Court directed a temporary screen to be erected to the height of the proposed buildings and appointed a surveyor to report on the effect (*d*).

It being a settled rule of construction that the grant of a principal thing shall be held by implication of law and without any express words of grant to carry with it all that is reasonably necessary for the enjoyment of the thing granted for the purpose for which, according to the obvious intent of the parties, the grant was made (*e*), the right to light passes (independently of the Conveyancing Act, 1881, s. 6) upon the sale of a house by the grant itself, even without any special word of conveyance. Where, accordingly, the same person possessing a house having the actual use and enjoyment of certain lights, and also possessing the adjoining land, either conveys the house in fee simple or demises it for a term of years, neither he, nor any person claiming under him, can derogate from his grant by building on the adjoining land so as to obstruct or interrupt the enjoyment of the lights, although the lights be new (*f*). The rule applies where the grants of the several parts of an estate take place not absolutely at the same moment but so far at the same moment that they are to be considered as one transaction and done at the same time (*g*), and where two lessees derive interest under the same landlord (*h*). So also the rule applies where a house and the adjoining land are respectively devised to different persons by the same testator (*i*).

The rule will not, however, apply where the buildings are

(*d*) *Leech v. Schweder*, 9 Ch. 463. 470 (C. A.).

(*e*) *Pomfret v. Ricroft*, 1 Saund. 322 e.; *Hull v. Lund*, 1 H. & C. 676; *Wood v. Saunders*, 10 Ch. 584; *Wheeldon v. Burrows*, 12 C. D. 49. (*g*) *Swansborough v. Coventry*, 9 Bing. 305; *Allen v. Taylor*, 16 C. D. 358; *Russell v. Watts*, 10 App. Ca. 612; and see *Phillips v. Low*, (1892) 1 Ch. 47.

(*f*) *Kelk v. Pearson*, 6 Ch. p. 813; *Leech v. Schweder*, 9 Ch. 472; *Wheeldon v. Burrows*, 12 C. D. 49; *Barnes v. Loach*, 4 Q. B. D. 494; *Myers v. Catterson*, 43 C. D. 47. (*h*) *Coutts v. Gorham*, Moo. & Malkin, 396; *Warner v. M'Bryde*, 36 L. T. 360.

(*i*) *Phillips v. Low*, (1892) 1 Ch. 47.

in an unfinished and skeleton state, and it is uncertain whether the openings which have been left in the walls are intended for doors or windows (*k*). The rule that a man may not derogate from his grant, was held not to apply in favour of the plaintiff in a case where the owner of two pieces of land on one of which houses had been built containing windows overlooking the other piece of land (which was vacant) contracted to sell the vacant piece of land to the defendant, and subsequently sold the houses to the plaintiff, although the conveyance to the plaintiff was executed before the conveyance to the plaintiff; inasmuch as at the date of the conveyance to the plaintiff, the defendant and not the vendor was the beneficial owner in equity of the vacant piece of land (*l*). Nor will the general rule that a man may not derogate from his own grant apply if the grantee knew that the grantor intended to use the adjoining land for a particular purpose and that that purpose was inconsistent with an implied grant of the easements required for the enjoyment of the property granted (*m*). But, having regard to sect. 6 of the Conveyancing Act, 1881, the fact that in the conveyance to the purchaser the land retained by the vendor is described as "building land" is not of itself sufficient to show an intention that the right to lights is not to pass (*n*). The expression "lights enjoyed" in the above section is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued (*o*).

If land unbuilt upon is simply conveyed, the mere intention on the part of the purchaser to build upon it is not sufficient to give him a grant of lights over land retained by the grantor (*p*). But if a man intending to build upon the land of another

(*k*) *Glave v. Harding*, 27 L. J. Ex. 286.

(*l*) *Beddington v. Atlee*, 35 C. D. 317.

(*m*) *Birmingham, Dudley, &c., Banking Co. v. Ross*, 38 C. D. 295 (C. A.); *Godwin v. Schweppes, Ltd.*, (1902) 1 Ch. 926.

(*n*) *Broomfield v. Williams*, (1897) 1 Ch. 602 (C. A.); *Pollard v. Gare*, (1901) 1 Ch. 834; but see *Godwin v. Schweppes, ante*.

(*o*) *Godwin v. Schweppes, ante*.

(*p*) *Blanchard v. Bridges*, 4 A. & E. 176; 53 R. R. 208.

General words in
a grant—how
restricted.

contracts to purchase it, and forthwith builds houses upon it, and afterwards takes a conveyance of the land with the buildings erected upon it, the right to the lights of the houses *de facto* existing at the time of the grant passes by the conveyance, and the grantor has no right to derogate from his grant by blocking up such lights (*q*).

General words in a grant are restricted to that which the grantor had power at the time to grant, and do not extend to anything which he might subsequently acquire. Where accordingly a lessor granted a lease for twenty-one years of a house with its appurtenances, among which lights were specified; and at the time of the grant he held an adjoining house for a term of years; and subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the adjoining house, those lights not being ancient lights, it was held that the lessor was not by his grant prevented from so building (*r*).

The mere fact of there being windows in an adjoining house which overlooks a purchased property is not constructive notice of any agreement giving a right of access of light to them (*s*).

If an owner of land, who grants part to a purchaser, intends to reserve any right in favour of the part retained, such reservation must as a rule be expressly made, and will not be implied (*t*). Where, however, houses have been built by the same person, as part of the same plan or scheme, and have been sold in an unfinished state to different persons, the openings of the windows being sufficiently visible (*u*), a mutual reservation of the right will be implied in favour of all the purchasers (*x*).

(*q*) *Robinson v. Grave*, 21 W. R. 223, 569, W. N. (1873) 83.

(*r*) *Booth v. Alcock*, 8 Ch. 663; and see *Beddington v. Atlee*, 35 C. D. 317, 327.

(*s*) *Allen v. Seckham*, 11 C. D. 791 (C. A.).

(*t*) *White v. Bass*, 7 H. & N. 722; *Wheeldon v. Burrows*, 12 C. D. 31, 49 (C. A.); and see *Bayley v. Great*

Western Railway Co., 26 C. D. p. 458; *Tava v. Knowles*, (1891) 2 Q. B. 564, 568.

(*u*) *Glave v. Harding*, 27 L. J. Ex. 286.

(*x*) *Compton v. Richards*, 1 Price, 27; *Russell v. Watts*, 23 C. D. p. 573, 10 A. C. 590. Cf. *Richards v. Rose*, 9 Exch. 218.

So also, where different buildings have been erected, forming part of one common scheme or general structure according to a plan in accordance with which the buildings were to be erected, of which plan the predecessors in title of the defendant had notice and had approved and which plan has also been approved by the party whose approval was necessary and his surveyor and a recital to that effect appears in the deed under which the defendant claims title, he cannot block up the plaintiff's light, although the conveyance to the defendant was prior in date to the conveyance to the plaintiff and did not contain any reservation of the right to light in favour of the part retained by the grantor and afterwards conveyed by him to the plaintiff (y).

Chap. VI.
Sect. 2.

The statutory rule as to the acquisition of a legal right to the enjoyment of light from long user depends upon the third and fourth clauses of the Prescription Act, 2 & 3 Will. IV. c. 71 (z). The actual and continuous enjoyment of light as an easement (a), by a dwelling-house, workshop, or other building (b), for twenty years next before the commencement of some suit or action in which the claim is brought in question (c), without interruption, acquiesced in for a year (d), is made by those clauses to confer an absolute and indefeasible title, unless the enjoyment can be shown to have been by consent or agreement expressly given, or made by deed or writing (e).

Prescription
Act, 2 & 3 Will.
IV. c. 71.

The general words in sect. 2 of the Prescription Act do not apply to light; and accordingly, the Crown not being named in sect. 3, no easement of light can be acquired against the Crown under the statute (f).

Section 3 of 2 &
3 Will. IV. c. 71,
does not bind the
Crown.

(y) *Russell v. Watts*, 10 App. Ca. N. S. 456.
590, 602.

(z) See *Truscott v. Merchant Tailors' Co.*, 11 Exch. 866; *Gale v. Warwick*, 3 Exch. 557.

(a) *Harbidge v. Warwick*, 3 Exch. 552; *Scott v. Pape*, 31 C. D. 554.

(b) See *Harris v. De Pinna*, 33 C. D. 238; *Clifford v. Holt*, (1899) 1 Ch. 698.

(c) *Cooper v. Hubbuck*, 12 C. B. Ch. 48 (C. A.).

(d) See *Onley v. Gardiner*, 4 M. & W. 497, 51 R. R. 704; *Harbidge v. Warwick*, 3 Exch. 557.

(e) See *Truscott v. Merchant Tailors' Co.*, 11 Exch. 863; *Tapling v. Jones*, 11 H. L. C. 290; *Bewley v. Atkinson*, 13 C. D. 283.

(f) *Perry v. Eames*, (1891) 1 Ch. 658; *Wheaton v. Maple*, (1893) 3

Chap. VI.
Sect. 2.

The evidence to sustain a prescription at common law need not come down to any defined period (*g*); but in cases coming within the statute the enjoyment must be up to the commencement of some action in which the particular claim has been brought into question (*h*). An enjoyment for twenty years or more before an action gives only an inchoate title, which may be completed or not by an enjoyment subsequent, according as that enjoyment is or is not continued up to the commencement of an action in which the claim is brought in question (*i*).

An "interruption" within the Act.

Interruption of the enjoyment will not prevent the right from being acquired under the statute, unless the interruption has been submitted to for one year after the party interrupted shall have had notice thereof (*k*). The term "interruption" in the statute refers to an actual obstruction, and not to a mere discontinuance of user (*l*). The twenty years' enjoyment which gives an absolute right to the access of light need not be an enjoyment, in fact "without interruption" for the period mentioned, but an enjoyment without such interruption as is contemplated by the statute (*m*). An interruption accordingly after an enjoyment of nineteen years, and the fraction of a year, is not such an interruption as will prevent the right from becoming absolute at the end of the twentieth year (*n*). But an action for an injunction to restrain an interference with the light cannot be brought until after the twenty years have expired (*o*).

"Enjoyment" of light within the Act.

To acquire a right to the access of light by actual enjoyment

(*g*) *Ward v. Ward*, 7 Exch. 838; 138, 143.
(*Cooper v. Hubbuck*, 12 C. B. N. S. 456.

(*h*) *Aynsley v. Glover*, 10 Ch. p. 285.

(*i*) *Ward v. Robins*, 15 M. & W. 241; *Hollins v. Verney*, 13 Q. B. D. 304, 314 (C. A.).

(*k*) 2 & 3 Will. 4, c. 71, s. 4; *Onley v. Gardiner*, 4 M. & W. 497, 51 R. R. 704; *Harbidge v. Warwick*, 3 Exch. 557; *Seddon v. Bank of Bolton*, 19 C. D. 404.

(*l*) *Smith v. Baxter*, (1900) 2 Ch.

(*m*) *Glover v. Coleman*, L. R. 10 C. P. 108.

(*n*) *Flight v. Thomas*, 8 Cl. & Fin. 231; 52 R. R. 468, 478. See *Eaton v. Swansea Waterworks Co.*, 17 Q. B., per Lord Campbell.

(*o*) *Carr v. Foster*, 3 Q. B. 581; *Harbidge v. Warwick*, 3 Exch. 557; *Bridewell Hospital v. Ward*, W. N. (1892) 194; *Lord Battersea v. Commissioners of Sewers*, (1895) 2 Ch. 708.

under the statute, it is not necessary that the house should be occupied or that it should be fit for immediate occupation during the statutory period (*p*). The "enjoyment" of the light, within the meaning of the Act, commences as soon as the exterior walls of the building with the spaces for the windows are completed, and the building roofed in, although the window-sashes and glass may not be put in and the interior may not be finished until some time afterwards (*q*). It is necessary, however, that the light should have reached the house by the same definite channel for the statutory period (*r*).

The right, if acquired against a lessee, binds the inheritance (*s*). A reversioner has, it seems, no means of preventing the right being acquired against him, unless he can prevail on his lessee to interrupt the enjoyment, or get an acknowledgment in writing that the enjoyment is by consent (*t*).

There is nothing in the statute that prevents a man from making a bargain with respect to windows. An agreement with regard to the windows of a house for valuable consideration is enforceable in equity in the same way, and under the same conditions as any other agreement with respect to real property (*u*).

Agreement as to
windows.

By the custom of London, a building might have been raised upon the old foundations to any height, although ancient windows or lights in the next house were stopped, if there was no agreement restrictive of the right (*x*). But if a title to light is shown under the statute, an obstruction cannot be justified by the custom of London, sect. 3 of the Prescription

Custom of
London.

(*p*) *Courtauld v. Legh*, L. R. 4 Ex. 126; *Collis v. Laughner*, (1894) 3 Ch. 659.

(*q*) *Collis v. Laughner*, (1894) 3 Ch. 659.

(*r*) *Harris v. De Pinna*, 33 C. D. 238 (C. A.). As to what amounts to "enjoyment" of light within the Act, see, further, *Cooper v. Straker*, 40 C. D. 21.

(*s*) *Simper v. Foley*, 2 J. & H. 555; *Ladyman v. Grave*, 6 Ch.

767.

(*t*) *Frewen v. Philipps*, 11 C. B. N. S. 449; *Mitchell v. Cantrill*, 37 C. D. 56.

(*u*) *Bewley v. Atkinson*, 13 C. D. 283, 300 (C. A.); and see *McManus v. Cooke*, 35 C. D. 681.

(*x*) Com. Dig. London, No. 5; *Winstanley v. Lee*, 2 Sw. 333, 339; *Perry v. Eames*, (1891) 1 Ch. 658, 667.

Chap. VI.
Sect. 2.

Extinguishment
and merger.

Act containing the words "any local usage or custom to the contrary notwithstanding" (y).

The right to the enjoyment of light by one tenement over another tenement, becomes, like other easements, extinguished upon unity of seisin and possession of both tenements in the same person, and merges in the general rights of property (z). If there be merely unity of possession without unity of seisin, the easement is suspended so long as the unity of possession continues, and revives again upon the severance of the possession (a).

Abandonment.

The privilege of receiving light through ancient windows may be lost by abandonment. The question whether the right has been abandoned is one of intention, to be gathered from all the circumstances of the case (b).

Alteration of
premises on
rebuilding.

The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right to the access and use of light to or for any building which may be substituted for the original building; the intention to abandon the right must be clearly established by evidence (c). Where a building while it existed had the right to have its ancient lights unobstructed and the building is taken down, the right is not abandoned but is only in abeyance. Until the right is abandoned, it is as much in existence after the building is pulled down as it was before, and is as much in the possession of the owner of the legal right as ever, even although his actual enjoyment of it may be suspended. There is nothing to prevent him from applying to the Court for an injunction to restrain an erection which would interfere with the easement of ancient lights where the Court is satisfied that he is about to restore the building with its ancient lights (d).

(y) See *Truscott v. Merchant Tailors' Co.*, 11 Exch. 855; *Cooper v. Hubbuck*, 12 C. B. N. S. 456; (1895) 2 Ch. 827, 831 (C. A.).

Perry v. Eames, (1891) 1 Ch. 658.

(z) *Canham v. Fisk*, 2 Cr. & J. 126; 37 R. R. 655.

(a) *Ladyman v. Grave*, 6 Ch. 763.

(b) *Moore v. Rawson*, 3 B. & C. 332, 27 R. R. 375; *Scott v. Pape*,

31 C. D. 554, 576 (C. A.); and cf. *Midland Railway Co. v. Gribble*, (1895) 2 Ch. 827, 831 (C. A.).

(c) *Greenwood v. Hornsey*, 33 C. D. 471; and see *Smith v. Baxter*, (1900) 2 Ch. 138.

(d) *Ecclesiastical Commissioners v. Kino*, 14 C. D. 213, 219.

An owner of ancient lights who alters or rebuilds his premises does not by putting new lights in the building or by enlarging the apertures of the old windows lose his right to the same amount of light which was wont to pass through the old windows (e). If he enlarges the windows, he still has the same right to that amount of light which for twenty years has passed through so much of the old windows as is left undisturbed. Nor is the right lost by reason of the fact that only part of the old windows is included in the new or that the old window has been added to either vertically or laterally by a new window. No alteration in the plans of the windows of the dominant tenement will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures the same or a substantial part of the same light which passed through the old apertures into the old buildings (f).

But a man who on the alteration of buildings or the rebuilding of premises comes to the Court for the protection of ancient lights must have evidence to show the co-incidence of the new with the ancient lights. It is not sufficient to show that from the position of the windows they must in parts co-incide with the old ones, even though it be not denied that probably some small parts of the new windows occupy portions of spaces through which light is admitted to the old buildings (g). The right to relief may be lost even where there is no substantial alteration if the owner of the dominant tenement has by his alterations so confused the evidence that he cannot prove the identity of the light (h).

Alteration of
premises on
rebuilding.

The fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction against a person who is obstructing them (i).

As it is extremely inconvenient to have questions of light

(e) *Newson v. Pender*, 27 C. D. (1881) 77 (C. A.); *Newson v. Pender*, 27 C. D. p. 46; *Pendarves v. Monro*, (1892) 1 Ch. 611.

(f) *Scott v. Pape*, 31 C. D. 554 (C. A.). (h) *Scott v. Pape*, 31 C. D. 554 (C. A.).

(g) *Fowlers v. Walker*, W. N. (i) *Staight v. Burn*, 5 Ch. 163.

Chap. VI.
Sect. 2.

Reference to
chambers on
granting the
injunction.

and air determined upon the motion for committal, the Court will not, if possible, grant an injunction in general terms. But if the evidence does not enable it to come to any satisfactory conclusion on a particular point, the Court will with the view of freeing both parties from inconveniences, so that the one will know previously what he may safely do, and the other what he may properly object to, give liberty to the parties on granting the injunction, to apply in Chambers with respect to the erection of buildings (*k*). In a recent case (*l*) the Court made a declaration of the plaintiffs' right in lieu of granting an injunction, the defendant undertaking to give the plaintiffs reasonable notice of his intention to build and to produce to the plaintiffs upon request his building plans.

Passage of air.

Windows which have the privilege of receiving light have also the privilege of receiving air, so that a person may not obstruct the passage of air to the windows of his neighbour (*m*). But it is only in very rare and special cases, involving danger to health, or at least something very nearly approaching to it, that the Court would be justified in interfering on the ground of diminution of air (*n*). There may, however, be circumstances in the case such as to justify the Court in holding that a covenant not to interrupt the free passage of air to the house of a neighbour may be implied (*o*). So also where the uninterrupted flow of air through a definite aperture or channel over a neighbour's land has been enjoyed as of right for a sufficient period, a right by way of easement may be acquired. But in the absence of actual contract a claim by way of easement to have the general current of air coming from a neighbour's land kept uninterrupted cannot be supported either at common law or under the statute (*p*). The access of air accordingly to the

(*k*) *Stokes v. City Offices Co.*, 2 H. & M. 650; *Yates v. Jack*, 1 Ch. 293; and see *Smith v. Baxter*, (1900) 2 Ch. 138; *Home and Colonial Stores v. Colls*, (1902) 1 Ch. 302 (C. A.).

(*l*) *Smith v. Baxter*, (1900) 2 Ch. 138.

(*m*) *Aldred's case*, 9 Co. Rep. 58 a.

(*n*) *City of London Brewery Co. v.*

Tennant, 9 Ch. 221, *per* Lord Selborne; *Baxter v. Bower*, 44 L. J. Ch. 626; *Perkins v. Slater*, 35 L. T. 356.

(*o*) *Hall v. Lichfield Brewery Co.*, 49 L. J. Ch. 655; *Aldin v. Latimer Clark*, (1894) 2 Ch. 437.

(*p*) *Harris v. De Pinna*, 33 C. D. 238 (C. A.); *Chastey v. Ackland*, (1895) 2 Ch. 389, (1897) A. C. 155.

chimney of a building cannot as against the occupier of neighbouring land be claimed either as a natural right of property or as an easement by prescription from the time of legal memory or by a lost grant or under the Prescription Act (*q*). So also the right of passage of undefined air for the purpose of serving a windmill (*r*) or drying timber (*s*) cannot be claimed by prescription. Where, however, a lease was granted in order that the land demised might be used for the purpose of carrying on the business of a timber merchant, and the lessee covenanted to carry on such business accordingly, it was held that the lessor was not entitled to build upon the adjoining property so as to interrupt the access of air to sheds upon the demised property used for drying timber, so as to interfere with the carrying on of the business in the ordinary course (*t*).

The enjoyment of pure and wholesome air is a right to which the owners of land and the inmates of a dwelling-house are of common right entitled. Any act which pollutes or corrupts the air is, strictly speaking, a nuisance (*u*); but, inasmuch as the business of life in cities and populous neighbourhoods renders it impossible that the air should retain its natural state of purity, the law does not regard trifling inconveniences. In order to constitute an actionable nuisance, the pollution of the air must be of so sensible a nature as to diminish materially the value or interfere materially with the comfort and enjoyment of property which a reasonable man is entitled to expect, regard, however, being always had to the situation and mode of occupation of the property injuriously affected (*x*). That which is a sensible and real inconvenience to property in one place, and occupied in one way, will be none to property situate in another place or occupied in another way. If a man lives in a town, he must of necessity submit himself to the consequences of the obligations of trade which may be carried on

Purity of air.

(*q*) *Bryant v. Lefever*, 4 C. P. D. 2 Ch. 437.
172.

(*r*) *Webb v. Bird*, 13 C. B. N. S. 841.

(*s*) *Harris v. De Pinna*, 33 C. D. 238 (C. A.).

(*t*) *Aldin v. Latimer Clark*, (1894) 9 Ch. 705.

(*u*) *Aldred's case*, 9 Co. R. 58 b.

(*x*) *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642; *Salvin v. North Brancepeth Coal Co.*,

in his immediate locality, and are necessary for the purposes of commerce and for the benefit of the inhabitants of the town and the public at large. But the law requires that business be carried on in a reasonable and proper manner, and so as not to cause unnecessary inconvenience. The fact that the locality where a particular trade is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action in respect of injury created by it to property in the neighbourhood. A man, who by an act on his own land causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount to a nuisance, cannot be heard to say that the place where the act was done was a proper and convenient one for the purpose (y).

Whether or not the pollution or corruption of air is substantial enough to induce the Court to exercise its protective jurisdiction is a question which must depend on the particular circumstances of the case. It is impossible to find any precise standard by which to determine the question. The Court may appoint a special referee to inspect and report as to the extent of the nuisance (z). Injunctions will be granted, on a proper case being made out, to restrain persons from burning bricks (a), or discharging smoke (b), or other noxious or offensive vapours, odours, or gases (c). Mere smoke or

(y) *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 615; *Bamford v. Turnley*, 3 B. & S. 62; *Reinhardt v. Mentasti*, 42 C. D. 685; *Att.-Gen. v. Cole*, (1901) 1 Ch. 205; cf. *Sanders-Clark v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373; *ante*, p. 123.

(z) *Broder v. Saillard*, 2 C. D. p. 694; 1 Set. 607.

(a) *Walter v. Selfe*, 4 De G. & S. 325, on appeal, 19 L. T. O. S. 308; *Pollock v. Lester*, 11 Ha. 266, and *Beardmore v. Treadwell*, 3 Giff. 683; compromised on appeal, *ib.* 701; *Boreham v. Hall*, W. N. (1870) 57; *Crawford v. Hornsea, &c., Steam Co.*,

W. N. (1876) 132.

(b) *Sampson v. Smith*, 8 Sim. 272; *Crumph v. Lambert*, 3 Eq. 409; *Haywood v. Richards*, 1 Set. 520; *Smith v. Midland Railway Co.*, 26 W. R. 10, W. N. (1877) 200.

(c) *Broadbent v. Imperial Gaslight Co.*, 7 D. M. & G. 436, 7 H. L. C. 600; *Tipping v. St. Helen's Smelting Co.*, 1 Ch. 66; *Barlow v. Bailey*, W. N. (1871) 95 (chemical works); *Cooke v. Forbes*, 5 Eq. 166 (chemical works); *Savile v. Kilner*, 26 L. T. 277 (glass works); *Umfreville v. Johnson*, 10 Ch. 580 (cement works); *Att.-Gen. v. Francis*, 1 Set. 605 (cement works); *Knight v. Gardner*,

offensive odour alone, unaccompanied by noxious vapours, is a sufficient ground for the interference of the Court (*d*). The fact that a man may have sold land with a full knowledge that certain works were about to be erected thereon, does not disentitle him or those claiming under him to complain of any nuisance which the works may cause (*e*).

A limekiln (*f*), a dye-house (*g*), a tan-pit, a glass house (*h*), a smelting-house, a tallow-furnace (*i*), a soap-boilery (*k*), a building for boiling whale blubber (*l*), or for boiling horse-flesh for dogs (*m*), a tallow chandler's shop (*n*), fat-melting works (*o*), a varnish maker's shop (*p*), a slaughter-house (*q*), a brew-house (*r*), and a hog-stye (*s*), have all been held to be nuisances at common law (*t*). But a brew-house (*u*) or a hospital for infectious diseases (*x*) (particularly having regard to the present state of science (*y*)), are not necessarily nuisances. A hospital, however, for getting together people suffering from infectious diseases will be a nuisance, if it endanger the public health by communicating disease, or if injury is caused thereby to the rights of owners of the adjoin-

Various nuisances to air.

19 L. T. 673 (manure works); *Gullick v. Tremlett*, 20 W. R. 358; *Bigsby v. Dickinson*, 25 W. R. 89 (chemical works); *Fleming v. Hislop*, 11 App. Ca. 691.

(*d*) *Crump v. Lambert*, 3 Eq. 409; *Gullick v. Tremlett*, 20 W. R. 358; *Boreham v. Hall*, W. N. (1870) 57, 22 L. T. 116. See *Swaine v. Great Northern Railway Co.*, 4 D. J. & S. 211.

(*e*) *Tipping v. St. Helen's Smelting Co.*, 1 Ch. 66.

(*f*) 4 Ass. 3. See *Aldred's case*, 9 Co. R. 58 b.

(*g*) *Ib.*

(*h*) *Jones v. Powell*, Palm. 539.

(*i*) *Morley v. Pragnell*, Cro. Car. 510, 1 Roll. Ab. 88. See, as to candle-making being a nuisance, *Arnot v. Brown*, 1 Macq. 229.

(*k*) *R. v. Pierce*, Show. 327.

(*l*) *Burntisland Whale Co. v.*

Trotter, 5 Wills. & Sh. Sc. Ap. 649.

(*m*) *Grinlley v. Booth*, 3 H. & C. 669.

(*n*) *Bliss v. Hall*, 4 Bing. N. C. 183; 44 R. R. 697.

(*o*) *Att.-Gen. v. Cole*, (1901) 1 Ch. 205.

(*p*) *R. v. Niel*, 2 Car. & P. 485; 31 R. R. 685.

(*q*) *R. v. Cross*, 2 Car. & P. 484; 31 R. R. 684. See *Pedie v. Swinton*, Macl. & Rob. Sc. Ap. Ca. 1018.

(*r*) *Jones v. Powell*, Hut. 136.

(*s*) *Aldred's case*, 9 Co. R. 58 b.

(*t*) See *Rex v. White*, 1 Burr. 333.

(*u*) *Att.-Gen. v. Cleaver*, 18 Ves. 218, 18 R. R. 159, n.; *Gorton v. Smart*, 1 Sim. & St. 66.

(*x*) *Baines v. Baker*, Amb. 158; *Att.-Gen. v. Corporation of Manchester*, (1893) 2 Ch. 87.

(*y*) *Att.-Gen. v. Corporation of Manchester*, (1893) 2 Ch. 87.

Chap. VI.
Sect. 2.

No time will
legalise a public
nuisance.

Noisy trades.

ing property (z). But the Court will not restrain by injunction the erection of a hospital for persons suffering from small-pox merely on the ground of apprehension of danger. The Court must be satisfied that there is a well-grounded apprehension of danger, or at least that the danger is appreciable(a). A small-pox hospital is not a noxious or offensive business within sect. 112 of the Public Health Act, 1875 (b).

The right to carry on an offensive trade so as to corrupt and pollute the air may be acquired against an individual by prescription or presumption of lost grant, but no length of time will legalise a public nuisance or enable a party to prescribe for its continuance. The public health, the welfare and safety of the community, are matters of permanent importance to which all the pursuits, occupations, and employments of individuals inconsistent with their preservation must yield (c).

The comfort and enjoyment in their home, to which the inmates of a dwelling-house are of right entitled, may be materially interfered with by the carrying on of noisy trades in the immediate neighbourhood. The law does not, however, regard trifling inconvenience, but only regards inconveniences which sensibly and materially diminish the comfort and enjoyment of property. In order that a noisy trade may be an actionable nuisance, there must be not merely a nominal but such a sensible and real damage as a reasonable man would, if subjected to, find injurious, regard being had, not only to the thing done, but to the surrounding circumstances, such as the situation and mode of occupation of the property. That which is a sensible and real inconvenience to property, situate in one place or occupied in one way, will be none to property situate in another place or occupied in another way. But a man who, in the exercise of a noisy trade, causes material damage to the

(z) *Metropolitan Asylum District v. Hill*, 6 App. Ca. 193, 207.

(a) *Matthews v. Mayor, &c., of Sheffield*, 31 Sol. J. 773; *Bendelow v. Guardians of Wortley Union*, 36 W. R. 168; *Fleet v. Metropolitan Asylums Board*, 2 T. L. R. 361; *Att.-Gen. v. Corporation of Mun-*

chester, (1893) 2 Ch. 87.

(b) *Withington Local Board v. Corporation of Manchester*, (1893) 2 Ch. 19 (C. A.).

(c) *Weld v. Hornby*, 7 East, 199, 8 R. R. 608; *R. v. Cross*, 3 Camp. 227, 13 R. R. 794; *Att.-Gen. v. Corporation of Barnsley*, W. N. (1874) 37.

property of a neighbour, cannot justify on the ground that the damage was caused by him in a reasonable and proper exercise of his trade in a reasonable and proper place (*d*). Nor is it material that the house may be in a manufacturing town, if that which is complained of is a material addition to existing nuisances (*e*).

Mere noise alone will, on a proper case being made out, be a sufficient ground for an injunction (*f*). Injunctions have accordingly been granted to restrain persons from ringing bells (*g*), or keeping horses in a stable very near a dwelling-house (*h*), or holding noisy entertainments and bringing together disorderly crowds (*i*), or using a garden as a skittle and bowling alley (*k*), or carrying on a trade (*l*), or dancing in rooms above the plaintiff's flat (*m*), or playing on musical instruments (*n*), so as to affect materially the comfort and enjoyment of property.

Injunctions to
restrain noise.

The right to make a noise so as to annoy a neighbour may be acquired by user or long enjoyment, but the right cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance. User which is

Prescriptive
right to cause
nuisance.

(*d*) *Scott v. Frith*, 4 F. & F. 349; *Gaunt v. Fynney*, 8 Ch. 8; *Reinhardt v. Mentasti*, 42 C. D. 685; and see *ante*, p. 156.

(*e*) *Crump v. Lambert*, 3 Eq. 409, 413.

(*f*) *White v. Cohen*, 1 Drew. 313; *Eaden v. Firth*, 1 H. & M. 573; *Crump v. Lambert*, 3 Eq. 409; *Fennick v. East London Railway Co.*, 20 Eq. 544; *Webb v. Barker*, W. N. (1881) 158. See, as to form of order, 1 Set. 606; *Lady Gort v. Clark*, 16 W. R. 569, W. N. (1868) 93; *Ball v. Ray*, 8 Ch. 467. See, as to order for appointment of special referee to report, *Broder v. Saillard*, 2 C. D. 694, 1 Set. 607.

(*g*) *Soltau v. De Held*, 2 Sim. N. S. 133. See *Hardman v. Holberton*, W. N. (1866) 379.

(*h*) *Ball v. Ray*, 8 Ch. 467;

Gullick v. Tremlett, 20 W. R. 358; *Broder v. Saillard*, 2 C. D. 692.

(*i*) *Walker v. Brewster*, 5 Eq. 25; *Inchbald v. Robinson*, 4 Ch. 388; *Freer v. Clewes*, 1 Set. 608; *Collins v. Slade*, W. N. (1874) 205; and see *Barber v. Penley*, (1893) 2 Ch. 447.

(*k*) *Barham v. Hodges*, W. N. (1876) 234.

(*l*) *Crump v. Lambert*, 3 Eq. 409; *Goose v. Bedford*, 21 W. R. 449; *Baxter v. Bower*, 44 L. J. Ch. 627, W. N. (1875) 11, 166; *Manser v. Bowers*, W. N. (1872) 163; *Beaumont v. Emery*, W. N. (1875) 106; *Sander v. Manley*, W. N. (1878) 181; comp. *Gaunt v. Fynney*, 8 Ch. 12.

(*m*) *Jenkins v. Jackson*, 40 C. D. 71.

(*n*) *Christie v. Duvey*, (1893) 1 Ch. 316.

Chap. VI.
Sect. 2.

neither physically capable of prevention by the owner of the servient tenement nor actionable, cannot support an easement (o). In a case where a confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and not complained of; and a few years before bringing the action the physician erected a consulting-room at the end of his garden, and then the noise and vibration became a nuisance to him; it was held that the defendant had not acquired a right to an easement of making a noise and vibration, and an injunction was granted to restrain him (p).

The fact that noise and vibration from machinery has not been complained of for more than twenty years does not deprive a neighbour of his right to prevent an increase of noise and vibration, even though such increase be slight (q).

Coming to a
nuisance.

The doctrine of coming to a nuisance (r) may be looked on as exploded (s). A man is not precluded from maintaining an action or a suit by the fact that the business which creates the nuisance had been carried on before he took possession (t). "The plaintiff," said Tindal, C. J. (u), "came to his house clothed with all the rights appurtenant, one of which at common law is a right to wholesome, untainted air, unless the business which creates the nuisance has been carried on for so great a length of time that the law will presume a grant from his neighbour in favour of the party who causes it." In *Tipping v. St. Helen's Smelting Co.* (x), the Court held that the fact that a man had come to a nuisance did not disentitle him to relief by injunction.

Right of drain
and drip

An interference with the right of drain is a nuisance to a

- | | |
|--|--|
| (o) <i>Sturges v. Bridgman</i> , 11 C. D. 852. | <i>Manchester</i> , (1893) 2 Ch. p. 95. |
| (p) <i>Ib.</i> See <i>Hollins v. Verney</i> , 13 Q. B. D. p. 309. | (t) <i>Elliotson v. Feetham</i> , 2 Bing. N. C. 134; 42 R. R. 557. |
| (q) <i>Heather v. Pardon</i> , 37 L. T. 393; and see <i>Sturges v. Bridgman</i> , 11 C. D. p. 859. | (u) <i>Ib.</i> ; <i>Sander v. Manley</i> , W. N. (1878) 181. |
| (r) See 2 Bl. Comm. 402. | (x) 1 Ch. 66. See <i>Crumph v. Lambert</i> , 3 Eq. 413; <i>Shotts Iron Co. v. Inglis</i> , 7 App. Ca. 528. |
| (s) <i>Att.-Gen. v. Corporation of</i> | |

house. If the owner of a house, being also owner of land surrounding it, makes a drain or conduit through part of the land to his house, and then sells the house with its appurtenants, the right to the conduit passes under the conveyance as a thing appertaining to the house. The right, however, is restricted to a reasonable use for the purpose of the house in the condition in which it was when the grant was made (*y*).

As between the occupiers of adjoining houses, the occupier who is bound to receive sewage passing in a drain under his house and from thence to other premises, is bound to keep the sewage from passing from his own premises to such other premises otherwise than along the accustomed channel; and this duty is independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain (*z*). But if the drain is a public sewer so that the occupier of the house which is bound to receive the sewage is not liable for its condition, he is not liable for an escape of sewage to the premises of his neighbour (*a*).

The same principles which apply to the right of drain are also applicable to the right of drip, or the right to the flow of water from the roof of one man's house on to the house or land of another. The owner of the dominant tenement may lessen the burden of the servient tenement, but he cannot increase it without the consent of its proprietor. Without such consent he cannot increase the surface of his roof or permit the water from neighbouring roofs to increase that which naturally falls from his own (*b*).

Rights of drain and rights of drip are rights to artificial watercourses, and are governed by the same principles and the same rules.

Other cases of nuisance to dwelling-houses, where equitable relief has been sought, are : a gunpowder manufactory (*c*) ; the

Varieties of
nuisances to
dwelling-houses.

(*y*) *Wood v. Saunders*, 10 Ch. 582.

(*z*) *Humphries v. Cousins*, 2 C. P. D. 239; comp. *Sutton v. Card*, W. N. (1886) 120.

(*a*) *Humphries v. Cousins*, 2 C. P. D. 239, 46 L. J. C. P. 442.

(*b*) See *Thomas v. Thomas*, 2 Cr.

M. & R. 34; 41 R. R. 678; *Fay v. Prentice*, 1 C. B. 828; *Harvey v. Walters*, 8 C. P. 164.

(*c*) *Crowder v. Tinkler*, 19 Ves. 617; 13 R. R. 267.

storing of damp jute, or other highly combustible materials (*d*) ; the obstruction of a chimney (*e*) ; the obstruction of the passage of air through a defined channel to a cellar (*f*) ; the allowing damp from an artificial mound to soak into the wall of a dwelling-house (*g*) ; the raising of the surface of land by an artificial erection so as to cause more rain water than was wont to flow into a house (*h*) ; damage from a cesspool flowing into a ditch used for surface drainage (*i*) ; the erection of a public urinal in a street (*k*) ; the blasting of a rock by gunpowder (*l*) ; the letting off of fireworks so as to endanger property (*m*) ; the establishment of a rifle range, or a range for trying firearms, in the neighbourhood of a dwelling-house (*n*) ; the keeping cattle in a pen in the neighbourhood of a dwelling-house (*o*) ; the obstruction of a footpath in front of a house (*p*) ; the breaking up a pavement (*q*) ; the holding a regatta with aquatic sports, and so bringing together large numbers of people (*r*) ; the obstruction of the access to a house by causing crowds to assemble for the purposes of a theatre (*s*).

(*d*) *Hepburn v. Lordan*, 2 H. & M. 345. See *Queen v. Lister*, 1 Dear. & B. C. C. 209.

(*e*) *Hervey v. Smith*, 1 K. & J. 389, 22 Beav. 299 ; comp. *Bryant v. Lefevre*, 4 C. P. D. 172.

(*f*) *Bass v. Gregory*, 25 Q. B. D. 481.

(*g*) *Broder v. Saillard*, 2 C. D. 692.

(*h*) *Hurdman v. North Eastern Railway Co.*, 3 C. P. D. 168.

(*i*) *Philipps v. Crouch*, W. N. (1866) 399.

(*k*) *Biddulph v. Vestry of St. George's*, 3 D. J. & S. 493 ; *Vernon v. Vestry of St. James's*, 16 C. D. 457 ; *Chibnal v. Paul*, 29 W. R. 536 ; *Sellers v. Matlock Local Board*, 14 Q. B. D. 929.

(*l*) *Arnold v. Furness Railway Co.*, 22 W. R. 613.

(*m*) *Schofield v. Reilly*, 1 Set. 608.

(*n*) *Bannister v. Bigge*, 34 Beav. 287 ; *Darvall v. Dougall*, 1 Set. 608 ; *Cadbury v. Walker*, ib. ; *Hawley v. Steele*, 6 C. D. 521.

(*o*) *London, Brighton, &c., Railway Co. v. Truman*, 11 App. Ca. 45.

(*p*) *Wedmore v. Mayor of Bristol*, 11 W. R. 136.

(*q*) *Dover Gaslight Co. v. Mayor of Dover*, 5 D. M. & G. 545. See *Queen v. Longton Gas Co.*, 2 El. & El. 651.

(*r*) *Bostock v. North Staffordshire Railway Co.*, 5 De G. & S. 584, 4 E. & B. 798, 3 Sm. & G. 283.

(*s*) *Barber v. Penley*, (1893) 2 Ch. 447.

SECTION III.—NUISANCES TO SUPPORT.

Chap. VI.
Sect. 3.

Support of soil.

THE right to the support of land in its natural state, vertically by the subjacent strata, and laterally by the adjacent soil, is a right to which the owner of the surface is of common right entitled (*t*). The right is not in the nature of an easement, but is an incident to the right of the ordinary enjoyment of property (*u*). The right is not a right to have the whole or any part of the subjacent or adjacent soil left in its natural state, but is simply a right to have the surface supported in its natural state, so far as the subjacent or adjacent soil is naturally capable of affording support. The owner of the subjacent or adjacent soil may work or dig on his own land in any way or to any extent he pleases, so long as he does not cause the surface of his neighbour's soil to subside or give way. He may, if an artificial support be substituted, excavate his land to such an extent as, but for the artificial support, would cause a subsidence of the neighbouring land. Until actual damage be done, no cause of action arises; but if damage result, neither the care and skill with which the works may have been carried on, nor the unstable nature of the soil, nor the difficulty of propping it up, will form any defence to an action (*x*). If there are successive subsidences caused by the same excavation, each subsidence gives rise to a fresh right of action (*y*). The right to support exists as well in the case of lands which are not conterminous as of lands which are conterminous. Any land which depends mediately or immediately on the support of other land, and is capable of

(*t*) *Humphries v. Brogden*, 12 Q. B. 746; *Hunt v. Peake*, John. 710; *Rowbotham v. Wilson*, 8 H. L. C. 348, 355; *Dixon v. White*, 8 App. Ca. 842, *per* Lord Blackburn.

(*u*) *Backhouse v. Bonomi*, 9 H. L. C. 512; *Dalton v. Angus*, 6 App. Ca. 809.

(*x*) *Humphries v. Brogden*, 12 Q. B. 746; *Hunt v. Peake*, John. 710; *Backhouse v. Bonomi*, 9 H. L. C. 512; *Dalton v. Angus*, 6 App. Ca. 803; *The Trinidad Asphalt Co. v.*

Ambard, (1899) A. C. 594, 602.

See, as to form of order restraining the working, removing or injuring the pillars left for the support of roofs in coal mines, *Mostyn v. Lancaster*, 23 C. D. 625; see, as to inspection of underground workings, 1 Set. 583.

(*y*) *Darley Main Colliery Co. v. Mitchell*, 11 A. C. 127; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503 C. A.).

being injured by its removal, is for this purpose neighbouring land (z).

The right of support is however limited to a right of support from land in its natural state to land in its natural state. If the support required is increased, either by increasing the weight of the supported land, or by diminishing its self-supporting power, no right exists in the absence of prescription or grant, to have this additional support supplied by the neighbouring land, and no subsidence resulting from this cause gives a right of action (a). If by the action of a landowner whose land intervenes between the lands of two other proprietors, the right of support to which one of these landowners is entitled is affected, he cannot as against the other landowner claim a greater right of support than he would have been entitled to, had the land of the intervening owner been left in its natural state (b).

Support of soil.

The right of support from land being a right to support from land in its natural state to land in its natural state, the right includes only the right to such support as is furnished by the permanent conditions of land, not by its accidental circumstances (c). The existence of water in a drowned mine being obviously a circumstance of an accidental and temporary character, a mine owner may drain it away, provided he works his mines in the ordinary and usual manner, although it may contribute to the support of the soil above. No right to resist the withdrawal of the water can be gained by prescription (d). So also, it seems that as a general rule, an adjoining owner may drain his soil, if for any reason it becomes necessary or convenient for him to do so, even though the result of doing so may be to cause a subsidence of the soil of his neighbour (e). Where, however, the plaintiff's land was

(z) *Browne v. Robins*, 4 H. & N. 186; *Buckhouse v. Bonomi*, 9 H. L. C. 503. *way Co.*, 1 J. & H. 145, 2 D. F. & J. 423, 10 H. L. C. 333.

(d) *Ib.*

(a) *Partridge v. Scott*, 3 M. & W. 220; 49 R. B. 578, and see *Dalton v. Angus*, 6 A. C. 740, 744.

(e) *Popplewell v. Hodgkinson*, L. R. 4 Ex. 249. See, however, *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 239, 242, 243; and see *Trinidad Asphalt Co. v. Ambarl*, (1899) A. C. 594.

(b) *Mayor, &c., of Birmingham v. Allen*, 6 C. D. 285.

(c) *Elliott v. North Eastern Rail-*

supported, not by a stratum of water, but by a bed of wet sand or running silt, and the defendants had caused the land to subside by withdrawing this support, it was held that an actionable nuisance had been committed (*f*).

Chap. VI.
Sect. 3.

The right to support of land and the right to support of buildings on land stand upon a different footing as to the mode of acquiring them, the former being a right of property analogous to the flow of a natural stream or of air, whilst the latter is an easement and is founded upon prescription or grant, express or implied ; but the character of the rights when acquired, is in each case the same (*g*).

Houses and
buildings.

A right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. The rule is the same where a building has been enlarged or pulled down and a building of an entirely different character has been built upon the land. The right to support of the new or enlarged building is established after a peaceable and uninterrupted enjoyment of support for twenty years, and an action will lie against the owner of the adjoining land if he disturbs his land so as to take away the right of lateral support, previously afforded to the land (*h*). So also a house which has stood for twenty years acquires a right to vertical support (*i*). But to establish a right to support by long enjoyment, it must be shown that the owner of the servient tenement knew or had the means of knowing that his house was affording support to the other (*k*).

A right to support of soil in excess of the ordinary common law right, arises by implication of law, where the owner of land has granted the surface, reserving to himself the subjacent minerals, or has granted any part of his land, retaining the adjoining part. As a grant of property carries with it all legal incidents which are necessary for the reasonable enjoyment of

Right of support
to land arising
by implication
upon severance.

(*f*) *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217 (C. A.).

(*i*) *Bell v. Love*, 10 Q. B. D. 548, 571 ; *Love v. Bell*, 9 A. C. 286.

(*g*) *Buckhouse v. Bonomi, E. B. & E.* 655, *per Willes, J.* ; *Dalton v. Angus*, 6 A. C. 792, 809.

(*k*) *Union Lighterage Co. v. London Graving Dock Co.*, (1901) 2 Ch. 300 ; (1902) 2 Ch. 557 (C. A.).

(*h*) *Dalton v. Angus*, *ib.*

Chap. VI.
Sect. 3.

the property in the state in which it was at the time of the grant or which are necessary for the purposes for which, according to the obvious intent of the parties, the grant was made (*l*), such a measure of support, adjacent and subjacent, as is necessary for the land in the condition it was at the time of the grant or in the state for the purpose of putting it into which the grant was made, passes as an incident to the grant (*m*). When accordingly a man grants a house, retaining the adjoining soil, the right of support from the adjoining soil passes by implication of law as being necessary and essential for the enjoyment of the house (*n*). So also where a man conveys land for the express purpose that buildings may be erected thereon, there is *prima facie* the grant of a right to have not only the surface of the land in its natural state, but the buildings to be erected thereon supported by the adjacent and subjacent minerals reserved to the grantor by the deed (*o*). So also a landowner who has granted land to a railway company for the purposes of their line, reserving to himself the minerals and all liberties and privileges of working them, may not work them so as to let down the surface. In reserving mines the landowner must be understood to have reserved them so far only as he can work them consistently with the grant he has made to the company. He cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing the necessary support. Though the railway traffic on the line be much greater than on the line originally contemplated, so that the support contemplated could not have been so great as that which is afterwards required, the law as to support is the same; for when a grant is made to a railway company, without any limitation as to its nature, the grantor must be understood to have warranted support, however the railway might be used, or to whatever

(*l*) *Hall v. Lund*, 1 H. & C. 685.

(*m*) *Caledonian Railway Co. v. Sprot*, 2 Macq. 461; *Elliott v. North Eastern Railway Co.*, 10 H. L. C. 333; *Hext v. Gill*, 7 Ch. 713; *Mundy v. Duke of Rutland*, 23 C. D. 89.

(*n*) *Dalton v. Angus*, 6 A. C. 826, per Lord Blackburn.

(*o*) *Aspden v. Seddon*, 10 Ch. p. 401; *Siddons v. Short*, 2 C. P. D. 572.

purpose it might be applied (*p*). Whether the conveyance is by an ordinary private assurance, or takes place under the compulsory powers of an Act of Parliament, the rule is the same (*q*). Nor does a proviso that any damage done by the working of the minerals shall be repaired at the expense of the mine-owner exclude the jurisdiction of the Court, where the reservation of the minerals has been upon condition that no damage be caused by working them (*r*). "There is," said Lord Hatherley, V.-C. (*s*), "a positive prohibition of such working, and though a remedy is provided for damage done, the provisions for compensation cannot interfere with the jurisdiction of this Court, and the company are entitled to an injunction to prevent the threatened injury." The owner of minerals is bound by the same obligations in respect of vertical and lateral support, as those by which the person through whom the claims was bound, and has the same rights (*t*).

The implied grant, arising upon the sale of a plot of land for building purposes, of the right to lateral support from adjoining land retained by the vendor, will be qualified where the purchaser is aware that the vendor intends to build on the land reserved; *e.g.*, where the land sold forms part of a building estate. In such a case, it seems that the vendor may excavate upon the adjoining land in a reasonable and proper manner to carry out his building works (*u*). But if, by building operations, the vendor (or a purchaser of any part of the land reserved) lets down the house of the first purchaser, he will be liable, provided that he could have built in a reasonable way without inflicting the injury (*x*).

Implied right of support—when qualified.

(*p*) *Caledonian Railway Co. v. J. 550.*

Sprot, 2 Macq. 449; *Caledonian Railway Co. v. Lord Belhaven*, 3 Macq. 56; *Proud v. Bates*, 34 L. J. Ch. 407; *Great Western Railway Co. v. Cefn Cribbar Brick Co.*, (1894) 2 Ch. 157.

(*q*) *Elliott v. North Eastern Railway Co.*, 10 H. L. C. 333; *London and North Western Railway Co. v. Evans*, (1893) 1 Ch. p. 27.

(*r*) *North Eastern Railway Co. v. Crossland*, 2 J. & H. 585, 4 D. F. &

(*s*) *Ib.*, 2 J. & H. 578.

(*t*) *North Eastern Railway Co. v. Crossland*, 4 D. F. & J. 550.

(*u*) See *Rigby v. Bennett*, 21 C. D. pp. 569, 570; and cf. *Birmingham, Dudley, &c., Banking Co. v. Ross*, 38 C. D. 295 (C. A.).

(*x*) *Rigby v. Bennett*, 21 C. D. 559 (C. A.); and see *Grosvenor Hotel Co. v. Hamilton*, (1894) 2 Q. B. 841, 842.

Chap. VI.
Sect. 3.

Right of support
may be qualified
by deed.

The *prima facie* right to support may be qualified or waived by deed or Act of Parliament so as to give a mine owner the right to work his mines, so as to let down the surface (*y*); but the words of the deed or Act must be express, and must show clearly and distinctly that the right has been qualified or waived (*z*), or it must appear by necessary intendment from something contained in the deed that it was not the intention of the parties that there should be a right to support (*a*). The presence or absence of a compensation clause is an important element in the construction of such Acts. The *prima facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation, although the presence of a limited compensation clause is not of itself sufficient to rebut the inference (*b*). Where, for example, there was an absolute and unqualified clause as to compensation, so that, whatever might be the extent of the damage sustained, full reparation was to be made for it, it was held that the mine owner had a right to let down the surface (*c*).

Compensation
clause—its
object and effect.

But a clause merely providing that the owner or lessee of the mines shall make compensation for damage done to the surface in working the mines does not afford sufficient ground for saying that the mine owner or lessee of the mines may let down the surface (*d*). Where accordingly there was a proviso in a mining lease that the lessee of the mines should have liberty to enter upon the land and carry away the minerals and to erect buildings and do and execute all such other acts, works and things upon, in or under or above the said premises as should be necessary or convenient for working and carrying away the minerals, making compensation for all damage

- (*y*) *Rowbotham v. Wilson*, 8 H. L. 360; *Elliott v. North Eastern Railway Co.*, 10 H. L. C. 333; *Dixon v. White*, 8 A. C. 842.
(*z*) *Hext v. Gill*, 7 Ch. 714; *Dixon v. White*, 8 A. C. 842; *Love v. Bell*, 9 App. Ca. 286.
(*a*) *Aspden v. Seeldon*, 10 Ch. 401; *Mundy v. Duke of Rutland*, 23 C. D. 89; *Dixon v. White*, 8 A. C. 842. See *Hayles v. Pease and Partners, Ltd.*, (1899) 1 Ch. 567.
(*b*) *Bell v. Earl Dudley*, (1895) 1 Ch. 182; *London and North Western Railway Co. v. Evans*, (1893) 1 Ch. 16 (C. A.).
(*c*) *Wakefield v. Duke of Burleigh*, L. R. 4 H. L. 406; *Hext v. Gill*, 7 Ch. 717; *Bell v. Earl Dudley*, (1895) 1 Ch. 182.
(*d*) *Davis v. Treharne*, 6 A. C. 160.

occasioned by the exercise of the rights thereby reserved, it was held that the mine owner might not work the mines so as to let down the surface (*e*). In such a case if the grantee, or lessee of the minerals cannot work the same without letting down the surface, he must not work them at all (*f*). So also where it was provided in an Inclosure Act that the mine owner should work the mines, he making satisfaction for the damage occasioned thereby to the owner of a freehold allotment on the surface at the rate of 5*l.* yearly during the working of the mines, it was held that he had no right to let down the surface (*g*). "A clause providing compensation," said Lord Watson (*h*), "will be presumed to be intended to cover damage resulting to the land-owner from the exercise of the powers previously reserved or granted to the owner of the mine. It is not the proper office nor is it presumably the intention of such a clause to define or extend the powers given to the mine owner: and it is frequently *ob majorem cautelam* and in the interest of the landowner expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface."

On the other hand, the terms of the grant of the surface may be such as to contract the grantee not only out of his right to support but even to compensation for loss of support (*i*).

A custom or prescription to work mines so as to let down or destroy the surface without making compensation for the injury and damage that may be done, is unreasonable and bad (*k*). But a custom that the lord of a manor may get all the minerals under copyhold lands, paying compensation to a

Custom as to
working mines
so as to let down
the surface.

(*e*) *Davis v. Treharne*, 6 A. C. 160; and see *Greenwell v. The Low Beechburn Coal Co.*, (1897) 2 Q. B. 165; *Earl of Westmoreland v. New Sharlston Collieries Co., Ltd.*, W. N. (1899) pp. 2, 88.

(*f*) *Earl of Westmoreland v. New Sharlston Collieries Co., Ltd.*, W. N. (1899) pp. 2, 88.

(*g*) *Love v. Bell*, 9 A. C. 286.

(*h*) *Ib.*, 299.

(*i*) *Williams v. Bagnall*, 15 W. R. 273; *Buchanan v. Andrew*, L. R. 2 H. L. Sc. 293; *Gill v. Dickinson*, 5 Q. B. D. 159.

(*k*) *Hilton v. Lord Granville*, Cr. & Ph. 283, 5 Q. B. 701; *Blackett v. Bradley*, 1 B. & S. 940; *Bell v. Love*, 10 Q. B. D. 559.

Chap. VI.
Sect. 3.

Option reserved
to a company to
purchase out
minerals within
a certain
distance.

copyhold tenant for any damage he may do to the surface in getting them, is good (l).

When a proposed undertaking passes through a mineral district, provisions are often inserted in the Act which authorises the undertaking, excepting all minerals under the land taken by the company, but giving the company power, as soon as the workings of the minerals approach within a certain distance of the surface, to stop the workings on purchasing out the rights of the coal owners and paying them compensation for their loss in not being permitted to work them. In *Dudley Canal Co. v. Grazebrook* (m), the clause which empowered the mine owner to proceed with the workings of the mines in the event of the option to purchase being declined, declared that he might carry them on "provided no injury be done to the navigation." The Court said that the meaning of the proviso could not be that the owners were to be responsible at all events for any injury done to the canal, for then the company would never purchase the minerals; that the reasonable mode of reconciling the different parts of the Act was to say "either that the party working the mines was to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary mode" (n).

Subsidence
caused by
excavations of
predecessor in
title.

It has been decided that the owner, or lessee, of minerals, is not liable for damage to neighbouring land or buildings by subsidence caused by the working of the minerals by the predecessor in title of such owner or lessee, although the damage occurs after such owner or lessee came into possession (o).

Railways Clauses
Consolidation
Act, 8 Vict. c
20, ss. 77—79.

General provisions, defining the respective rights of mine owners and railway companies, have been inserted in the

(l) *Aspiden v. Seddon*, 1 Ex. D. 510, per Mellish, L. J.

(m) 1 B. & Ad. 59; 35 B. R. 212.

(n) See *Stourbridge Canal Co. v. Earl of Dudley*, 3 El. & El. 409; *Great Western Railway Co. v. Bennett*, L. R. 2 H. L. 27; *Chamber Colliery Co. v. Rochdale Canal Co.*, (1895) A. C. 564; *New Moss Colliery Co.*

v. Manchester, &c., Railway Co., (1897) 1 Ch. 725. But see *Lancashire and Yorkshire Railway Co. v. Knowles*, 20 Q. B. D. 391, 14 A. C. 248.

(o) *Hall v. Duke of Norfolk*, (1900) 2 Ch. 493; *Greenwell v. Low Beechburn Coal Co.*, (1897) 2 Q. B. 165.

Railways Clauses Consolidation Act, 8 Vict. c. 20. By the 77th clause all *mines* are excepted out of the conveyance to the company, unless they shall have been expressly named therein and conveyed thereby (*p*).

Chap. VI.
Sect. 3.

The word "mines" in the clause includes minerals, whether gotten by underground or by open working (*q*). But although a mineral, *primâ facie*, includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral excepted is excepted only by virtue of a statutory reservation. Accordingly, clay forming the surface or subsoil, and constituting "the land" purchased for the purposes of the undertaking, is not a mineral within sect. 77 of the Act (*r*).

Meaning of
"Mines."

The 78th clause provides that the mines under the line, or within forty yards therefrom, shall not be worked if the company are willing to purchase them, and pay compensation to the owner. Before proceeding to work them the owner is required to give thirty days' notice of his intention to do so to the company, so as to give them the power of exercising the option (*s*). By the 79th clause it is enacted that if the company do not within thirty days state their willingness to purchase the minerals, the owner may work the mines "so that the working be done in a manner proper and necessary for the beneficial working thereof and according to the usual working of such mines in the district where the same shall be situate." It is also provided by the same clause that if any damage be done to the railway by any improper working, it shall be repaired at the expense of the owner.

In construing these clauses, the Exchequer Chamber in *Fletcher v. Great Western Railway Co.* (*t*), followed the general principle laid down in *Dudley Canal Co. v. Grazebrook*, and

Sections 77 & 79
of Railways
Clauses Act.

(*p*) See *Metropolitan, &c., Railway Co. v. Cotton*, 45 L. T. 103.

(*r*) *Great Western Railway Co. v. Blades*, (1901) 2 Ch. 624.

(*q*) *Midland Railway Co. v. Haunchwood, &c., Tile Co.*, 20 C. D. 552; *Midland Railway Co. v. Robinson*, 37 C. D. 387, 15 A. C. 19.

(*s*) See *Midland Railway Co. v. Robinson*, 37 C. D. 387, 15 A. C. 19.

(*t*) 5 H. & N. 689.

Chap. VI.
Sect. 3.

held that a mine owner was entitled to claim compensation for such minerals lying within forty yards as he might leave ungotten for the purpose of furnishing support to the railway. "All that the railway company requires," said Cockburn, C.J., in delivering the judgment of the Court (*u*), "is the surface soil: it may be that the minerals will never be worked by the landowner, in which case the company ought not to be subject to any expense; and, therefore, the legislature interposes and says that the company shall be under no obligation to pay the landowner for that which may never be required: but if the mines come to be worked and the company requires them as necessary for the support of the surface, they must make compensation to the landowner. The very fact that provision is made by the 78th section for possible injury to the railway, shows that the legislature intended to reserve the question of support and compensation. The legislation would be incomplete, if it were not applicable to the case of a landowner, who, having parted with the surface soil to be used by a company for the purpose of putting an additional weight upon it, as a railway company must necessarily do, shall afterwards entertain an idea of working the mines under or in the neighbourhood of a railway. The minerals are reserved to the landowner, and the railway company is under no obligation of making any compensation in respect of them, until the necessity for it arises from his desire to work them. In such a case the company are to consider whether the working is liable to damage the railway, and then if they are willing to make such compensation for the mines, the owner is not to work them. The mines may never be worked, and it would be a great hardship on a railway company if, upon a speculative possibility, they were bound to make compensation for not working them. Such is the plain, intelligent, and equitable construction of these clauses, and one which is consistent with the scope of the Act" (*x*). In *London and North Western Railway Co. v. Ackroyd* (*y*), accordingly, Wood, V.-C., refused to restrain a mine owner from working

(*u*) 5 H. & N. pp. 698, 699.

Smith v. Great Western Railway Co., 3 A. C. 178.

(*x*) See *Great Western Railway Co. v. Bennett*, L. R. 2 H. L. 27;

(*y*) 31 L. J. Ch. 588.

coal within forty yards of a tunnel of the plaintiffs, who endeavoured to establish a right to support without making compensation. If the mine owner proceeds to work his mines within the specified distance, without giving notice to the company of his intention to do so, as required either by special Act, or by the 78th clause of the Railways Clauses Consolidation Act, he will be restrained by injunction (z).

Chap. VI.
Sect. 3.

The result of the authorities on the subject of the right of a public company to support for its line and works within a mineral district appears to be that where land with a reservation of the minerals has been conveyed by a private assurance (a), or has been taken under the compulsory powers of an Act of Parliament (b), and there is a proviso in the assurance, or the Act, that the minerals reserved shall not be worked so as to cause any damage to the works of the company, but no option is given to the company of purchasing out the minerals, when the working of the mines shall have advanced within a certain distance from the surface, the company are entitled to all subjacent and adjacent support which is given by the common law (c), and the mine owner is not entitled to any compensation for not working, or not being allowed to work his mines so near the works of the company so as to cause them damage (d). The claim for compensation ought to have been made at the time when the land was sold, or care ought to have been taken to insert a special clause in the Act to that effect (e). Where, on the other hand, an option to purchase minerals lying within a certain distance from the works and line of the company has been reserved to the company either by special Act, or by the Railways Clauses Consolidation Act, 8 Vict. c. 20, s. 78, but

Result of the
authorities upon
the subject of
support in a
mineral district.

(z) *Elliott v. North Eastern Railway Co.*, 10 H. L. C. 333.

(a) *Caledonian Railway Co. v. Sprot*, 2 Macq. 449.

(b) *Elliott v. North Eastern Railway Co.*, 10 H. L. C. 333; *Great Western Railway Co. v. Cefn Cribbwr Brick Co.*, (1894) 2 Ch. 157.

(c) *Elliott v. North Eastern Rail-*

way Co., 10 H. L. C. 333; cf. *London and North Western Railway Co. v. Evans*, (1893) 1 Ch. 16 (C. A.).

(d) *Reg. v. Aire and Calder Navigation Co.*, 30 L. J. Q. B. 337.

(e) *North Eastern Railway Co. v. Elliott*, 1 J. & H. 154; *Rex v. Leeds and Selby Railway Co.*, 3 A. & E. 683.

Chap. VI.
Sect. 3.

the company decline, after due notice, to exercise the option, the mine owner may work within the specified distance without being answerable for any damage, provided the mines have been worked in the proper and ordinary manner, or according to the usual manner of working mines in the district. The Court will not restrain him from working them, except upon condition that compensation be made to him for his loss in not working them (*f*).

Railways Clauses
Act, s. 78.

It is not necessary that the notice required by sect. 78 should be given by the person about to work the mines. Notice given by the owner of his intention to work the mines by his lessees is sufficient (*g*). But there must be not only an expression, but an honest actual existence of the desire to work, either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow such a notice to be acted upon (*h*).

Though a mine owner may give notice under sect. 78 of his intention to work the minerals under a railway, the railway company is not bound to any fixed period after that notice within which they must give a counter notice. They can stop the working at any time thereafter when they fear danger to the line by notice of their willingness to pay compensation for the minerals they wish to be left unworked (*i*).

A railway company by paying compensation under sect. 78

(*f*) *Stourbridge Canal Co. v. Earl of Dudley*, 3 El. & El. 409; *Fletcher v. Great Western Railway Co.*, 5 H. & N. 689; *Bagnall v. London and North Western Railway Co.*, 1 H. & C. 554; *Great Western Railway Co. v. Bennett*, L. R. 2 H. L. 27; *Midland Railway Co. v. Checkley*, 4 Eq. 25; *Midland Railway v. Miles*, 33 C. D. 632; *Ruabon Brick, &c., Co. v. Great Western Railway Co.*, (1893) 1 Ch. 427 (C. A.); *In re Lord Gerard and London and North Western Rail-*

way Co., (1895), 1 Q. B. 466, 467. A man who derives title under a railway company has no greater right in this respect to support than the company itself had: *Pountney v. Clayton*, 11 Q. B. D. 820 (C. A.).

(*g*) *Midland Railway Co. v. Robinson*, 37 C. D. 387, 15 A. C. 19.

(*h*) 37 C. D. p. 397, 15 A. C. p. 32.

(*i*) *Dixon v. Caledonian Railway Co.*, 5 A. C. 820.

to a mineral lessee for leaving the minerals under the line, acquires the right to support from such minerals, and the right to restrain the reversioner on the surrender or determination of the lease from working the minerals without prejudice to any question as to compensation, having regard to the payment already made (*k*).

Where the minerals lie beyond the specified distance, and therefore are within the proper bounds of the mine owner, a company has the ordinary right of a purchaser to support without paying compensation for the non-working of the minerals (*l*).

A railway company, having the usual power to purchase lands under its special Act, has, by virtue of the 6th section of the Lands Clauses Act, 1845, power also to purchase the minerals under those lands at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable: and that power is not taken away by sect. 77 and the following sections of the Railways Clauses Act, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buying the minerals at once together with the surface land (*m*).

There is no distinction between the severance of ownership vertically, that is, of the surface land from the mines beneath, and the severance of ownership laterally by the taking of successive purchases of surface land from the same landowner. So a railway company, having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands (*n*).

The Public Health Act, 1875, imposes on landowners through whose land a sewer is run under that Act an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to

Public Health
Act, 1875.
Support for
sewer.

(*k*) *Smith v. Great Western Railway Co.*, 3 A. C. 178.

2 D. F. & J. 423, 10 H. L. C. 383.

(*l*) *Caledonian Railway Co. v. Sprot*, 2 Macq. 449; *Elliott v. North Eastern Railway Co.*, 1 J. & H. 154,

(*m*) *Errington v. Metropolitan District Railway Co.*, 19 C. D. 559.

(*n*) *Ib.*

Chap. VI.
Sect. 3.

Right of support
as between ad-
joining houses.

work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines (*o*).

As between two adjoining houses belonging to different owners, a right to lateral support can be acquired by long enjoyment, or under the provisions of the Prescription Act (*p*). So, also, if a building is divided into floors separately owned, the owner of each upper floor or flat is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself (*q*). Where also houses have been so constructed as to be mutually subservient, to and depending on each other, neither of them being capable of standing or being enjoyed without the support it derives from its neighbour, the alienation of one house by the owner of both does not estop him from claiming in respect of the house he retains that support from the house sold which is at the same time afforded in return by the former to the latter tenement (*r*).

Although no right to support may exist as between adjoining houses or buildings, a man who takes down his house must use due care and skill, and take reasonable and proper precautions in pulling down his wall. An action will lie if the wall be pulled down so carelessly, negligently, and unskillfully as to cause damage to the adjacent house or buildings (*s*). The owner of the premises adjoining those pulled down must shore up his own on the inside, and do everything proper to be done upon them for their protection. If, however, the pulling down be irregularly and improperly done, and injury is caused thereby, the person so acting may be liable for it, although the owner of the premises injured may not have done all he ought for his protection (*t*).

The mere circumstance of juxta-position does not render it

(*o*) *Corporation of Dudley v. Dudley's Trustees*, 8 Q. B. D. 86. See, however, the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883.

(*p*) *Lemaitre v. Davis*, 19 C. D. 281.

(*q*) *Dalton v. Angus*, 6 App. Ca. 793, *per* Lord Selborne.

(*r*) *Richards v. Rose*, 9 Exch. 218, 221; *cf. Howarth v. Armstrong*, 77 L. T. 62.

(*s*) *Walters v. Pfeil*, Moo. & M. 363; *Brown v. Windsor*, 1 Cr. & J. 26; *Trower v. Chadwick*, 3 Bing. N. C. 334; 43 R. R. 659; 6 Bing. N. C. 1.

(*t*) *Walters v. Pfeil*, Moo. & M. 363.

necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall (*u*); nor if he is ignorant of the existence of the adjoining wall—as where it is underground—is he bound to use extraordinary care in pulling down his own (*x*). If he gives notice of his intention to pull down his wall to the owner of the adjoining premises, he is not bound to use any extraordinary care in preventing an injury to the adjoining premises, although, from the peculiar nature of the soil, he may be compelled to lay the foundation of his new buildings several feet deeper than that of the old ones (*y*).

A party wall is a wall standing on the line between two estates owned by different owners for the use of both estates. The common use of a wall separating adjoining lots of land belonging to different owners is *primâ facie* evidence that the wall and the land on which it stands belong to both owners in equal undivided moieties as tenants in common (*z*). A wall may be a party wall to such a height as it belongs in common to two buildings, and may be an external wall for the rest of its height (*a*). One of the tenants in common may take down the wall, if it be done with the intention of rebuilding it (*b*), but it must be with that intention (*c*).

Under the Party Wall Act, 14 Geo. III. c. 78, each owner of adjoining premises within the cities of London and Westminster having a common party wall which stands partly on the land of each of them, owns that which is on his own land, and there is no tenancy in common, but each is entitled to certain easements in the wall of the other (*d*). This statute has been

(*u*) *Trower v. Chadwick*, 6 Bing. N. C. 1.

(*x*) *Ib*.

(*y*) *Massey v. Goyder*, 4 C. & P. 161, 34 R. R. 782.

(*z*) *Matts v. Hawkins*, 5 Taunt. 20; 14 R. R. 695; *Cubitt v. Porter*, 8 B. & C. 257; 32 R. R. 374; *Watson v. Gray*, 14 C. D. 195.

(*a*) *Weston v. Arnold*, 8 Ch. 1084; *Drury v. Army and Navy Co-operative Supply Co.*, (1896) 2 Q. B. 271.

(*b*) *Cubitt v. Porter*, 8 B. & C. 257; 32 R. R. 374; *Standard Bank, &c. v. Stokes*, 47 L. J. Ch. 554. See, as to duty of person taking down a party wall to see that reasonable skill is exercised, *Hughes v. Percival*, 8 A. C. 443.

(*c*) *Stedman v. Smith*, 8 E. & B. 1. See *Colebeck v. Girallers' Co.*, 1 Q. B. D. 242.

(*d*) *Matts v. Hawkins*, 5 Taunt. 20; 14 R. R. 695.

Chap. VI.
Sect. 3.

repealed, and the law on the subject of party walls within the Metropolitan District (*e*) is now governed by the London Building Act, 1894 (*f*).

SECTION IV.—NUISANCES RELATING TO WATER.

Chap. VI.
Sect. 4.

ANOTHER class of nuisances in which the interference of the Court by way of injunction is often sought, are nuisances relating to water. All acts done by a man on his own land, whereby the rights of his neighbour in water are injuriously affected, or whereby water becomes a cause of damage to the land of his neighbour, may be considered together as nuisances relating to water.

Bed of rivers.

Prima facie, every proprietor of land along the margin of a river or stream of running water is the proprietor of the land covered by the water up to the middle thread of the stream. If the same person be the owner of the land on both sides of the river, he owns the bed of the whole river to the extent of the length of his land upon it (*g*), and has the usual rights of a landowner in respect of the same. But this is subject to all the rights of the owners above him to have the water flow away from their land, and to all the rights of the owners below him to have the water come to their land as it was wont, and it is also subject to any rights the public may have over it (*h*). A grant of land bounded upon a stream or river above tide-water carries the soil up to the centre of the stream, unless there is enough in the surrounding circumstances in relation to the property in question or enough in the expressions of the

(*e*) See *Wheeler v. Gray*, 4 C. B. N. S. 584; *Seawell v. Webster*, 7 W. R. 691; *Cowen v. Phillips*, 33 Beav. 19; *Standard Bank, &c. v. Stokes*, 47 L. J. Ch. 554; *Knight v. Pursell*, 11 C. D. 415.

(*f*) As to who is an "owner," within the meaning of sects. 5 and 90 of this Act, upon whom the notice required by sect. 90 must be served

by the "building owner," see *List v. Tharp*, (1897) 1 Ch. 260.

(*g*) *Hargr. Tracts*, 5; *Wright v. Howard*, 1 Sim. & St. 190; 24 R. R. 169; *Bickett v. Morris*, L. R. H. L. 1 Sc. 47. See as to soil of lakes, *Bristow v. Cormican*, 3 A. C. 666.

(*h*) *Culdwell v. Maclaren*, 9 A. C. p. 404.

instrument to show that such was not the intention of the parties (i).

If from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they are entitled to use the adjoining land; but no riparian proprietor is entitled to use his property in the *alveus* in such a manner as to interfere with the natural flow of the stream or to cause an injury to the proprietary rights of any other riparian proprietor (k).

There is no distinction in principle between riparian rights on the banks of navigable, and on those of non-navigable rivers. In the former case, however, there must be no interference with the right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically (l).

A proprietor of land upon the banks of a river or stream of running water has no property in the water, but has merely a usufructuary interest in the water, as appurtenant to his land. He is entitled to the comfort, enjoyment, and benefit of the water in its natural state, as it flows past his land, as he is to all the other advantages belonging to the land of which he is owner (m). The right does not depend on the ownership of the soil covered by the water, but is appurtenant to the ownership of the bank (n). The rights which a riparian proprietor has with respect to the water in a stream are derived from his

Rights in running water.

(i) *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *Micklethwaite v. Newlay Bridge Co.*, 33 C. D. 145; *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 263; *Pryor v. Petre*, (1894) 2 Ch. p. 25 (C. A.); *Tilbury v. Silva*, 45 C. D. 98 (C. A.); *In re White's Charities*, (1898) 1 Ch. p. 664. Cf. *Ecroyd v. Coulthard*, (1897) 2 Ch. 555; (1898) 2 Ch. 358.

(k) *Bickett v. Morris*, L. R. H. L. 1 Sc. 47; *Orr Ewing v. Colquhoun*, 2 A. C. 861. See *Foot v. Robertson*,

6 Dec. of Court of Session, 4th series, 1290.

(l) *North Shore Railway Co. v. Pion*, 14 A. C. 612.

(m) *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Chasemore v. Richards*, 7 H. L. C. 349; *Kensit v. Great Eastern Railway Co.*, 27 C. D. p. 133.

(n) *Wood v. Wand*, 3 Exch. 748; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *Lyon v. Fishmongers' Co.*, 1 A. C. 673, 683.

Chap. VI.
Sect. 4.

possession of the land abutting on the water. If a riparian proprietor grants away any portion of his land abutting on the river, the grantee becomes a riparian proprietor and has the rights of a riparian proprietor; but if he grants away a portion of his estate not abutting on the river, the grantee acquired no water rights. A riparian proprietor cannot grant away his water rights apart from his estate so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. If a riparian proprietor grants to one not a riparian proprietor a right to take water from the stream, the grantee cannot maintain an action in his own name against other riparian proprietors. He can only sue the grantor for an interference with his enjoyment (o).

A riparian proprietor may grant a license to an owner of land not abutting on the river to abstract water from the stream by a pipe inserted in the stream on the licensor's land, and if after using it the licensee returns it to the stream undiminished in quantity and unpolluted in quality before the stream leaves the land of the licensor, a lower riparian proprietor has no ground of action against the licensee so taking the water against the riparian proprietor from whose land it was taken (p). But a riparian proprietor has a right of action against a non-riparian proprietor who takes water from a stream under a grant or license from a riparian proprietor, if his user of the water sensibly affects the flow or the quality of the water of the stream (q).

Rights of a
riparian
proprietor.

A riparian proprietor has a right to the fall and flow of the water and to the impelling force of the current for mill or other manufacturing purposes; and as incident thereto he has a right to erect dams, sluices, canals and waterways so as to fit the stream for the actual working of mills; but he may not, in doing so, accelerate the velocity of the current, so as to cause material injury or annoyance to his neighbour below him, who

(o) *Stockport Waterworks Co. v.* 155 (C. A.).

Potter, 3 H. & C. 300; *Nuttall v.*

Brucewell, L. R. 2 Ex. 1; *Holker v.*

Porritt, ib. 10 Ex. 61, 63; *Ormerod*

v. Todmorden Mill Co., 11 Q. B. D.

(p) *Kensit v. Great Eastern Railway Co.*, 27 C. D. 122.

(q) *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155 (C. A.).

has an equal right to the subsequent use of the same water in its natural state, or retard the flow, or throw back the water so as injuriously to affect the grounds, mills or springs of his neighbour above him (*r*). This is the clear and settled principle on the subject, but there is often difficulty in the application of it. A certain diminution in the quantity of the water, or an acceleration or retardation of the flow, is generally an implied element in the right of issuing the stream at all, but *de minimis non curat lex*, and unless the use be such as to affect materially the adjoining proprietor, a right of action will not arise. The test in all cases is whether the extent or mode of enjoyment has been such as to inflict a positive or sensible injury upon other riparian proprietors, or to interfere in a substantial and perceptible degree with their common right to a like user of the same water (*s*). So long as a reasonable user is made by a man of the water, and no actual or perceptible damage arises to the right of another to a similar use of the same water, no action will lie (*t*). If, however, the user be unreasonable, an action will lie although there be no actual present damage (*u*).

Whether the user of the water by an upper proprietor be reasonable is generally a question of fact depending on the particular circumstances of the case. Enjoyment of water for cattle or domestic purposes may be called the *ordinary user*. However small the stream, and however large the supply taken may be, user for these purposes is always reasonable, provided the enjoyment is *bonâ fide* and is had in the ordinary mode according to the common usage of the country. A proprietor lower down the stream has no ground of complaint against a

User of water
for domestic
purposes.

(*r*) *Wright v. Howard*, 1 Sim. & St. 203; 24 R. R. 169; *Mason v. Hill*, 5 B. & A. 19; 39 R. R. 354; *Embrey v. Owen*, 6 Exch. 369; *Orr Ewing v. Colquhoun*, 2 A. C. 854, per Lord Blackburn. See, as to throwing back water, *Cooper v. Barber*, 3 Taunt. 99; 12 R. R. 604; *Saunders v. Newman*, 1 B. & Ald. 258; 19 R. R. 312.

(*s*) *Embrey v. Owen*, 6 Exch. 353;

Sampson v. Hoddinott, 1 C. B. N. S. 590; *Lord Sandwich v. Great Northern Railway Co.*, 10 C. D. 707.

(*t*) *Embrey v. Owen*, 6 Exch. 353; *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.).

(*u*) *Ib.*; *Att.-Gen. v. Great Eastern Railway Co.*, 6 Ch. 577; *Swindon Waterworks Co. v. Wilts and Berks Canal, &c., Co.*, 7 L. R. H. L. 705.

Chap. VI.
Sect. 4.

User of water for
manufacturing
or agricultural
purposes.

proprietor higher up in case of a deficiency of the water (x). The enjoyment of water for manufacturing or agricultural purposes may be called the *extraordinary user*. The right to a reasonable use of the water being common to all the riparian proprietors, it is often difficult to determine whether a particular use is consistent with this common right. In determining the question a just regard must be had to the force and magnitude of the current, the volume of water, its height and velocity, the fall, the nature of the soil, the mode and duration of the user, the general usage of the country, and all other circumstances which may, in a particular case, bear upon the question. To take a large quantity of water from a large river for manufacturing or agricultural purposes would cause no sensible or perceptible diminution of the benefit to the prejudice of a lower proprietor, whereas taking the same quantity from a small stream passing a farm would be a great and manifest injury to those below who use it for domestic supply and to water cattle; and therefore it would be an unreasonable use of the water in the latter case, and not in the former. The question in each case is entirely one of degree. It is impossible to define precisely the limits which separate the permitted use of a stream from its wrongful application (y).

The question of reasonable user most frequently arises between mill owners on streams which afford a power available for the propulsion of machinery. The maxim that water should be allowed to flow, as it is wont to flow, if strictly construed and applied would prevent the use of such streams for manufacturing purposes. The construction of dams to collect a head of water and of sluices and canals to convey and discharge it is necessary to the operation of mills propelled by the water of a stream.

(x) *Miner v. Gilmour*, 12 Moo. P. C. 131, as modified by *Lord Norbury v. Kitchen*, 9 Jur. N. S. 132. See *Wood v. Waud*, 3 Exch. 781; *Nuttall v. Bracewell*, L. R. 2 Ex. 1.

(y) *Embrey v. Owen*, 6 Exch. 369; *Swindon Waterworks Co. v. Berks and Wilts Canal Co.*, L. R. 7 H. L. p. 704. See *Ormerod v. Todmorden*

Mill Co., 11 Q. B. D. 155; *Belfast Co. v. Boyd*, 21 L. R. Ir. 560; *Mostyn v. Atherton*, (1899) 2 Ch. 360; *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.). See as to the detention of water, *Shears v. Wood*, 7 Moo. 345; *Williams v. Morland*, 2 B. & C. 910; 26 R. R. 579; *Sampson v. Hoddinott*, 1 C. B. N. S. 590.

The use of these appliances necessarily to a greater or less degree disturbs and interrupts the natural flow of the current and often injures the proprietor below. But the fact that injury is occasioned to other riparian owners from the construction and use of dams is not decisive of the question whether such use is permissible. Dams may however be so constructed and used as to interfere with the common right of riparian owners and subject the party maintaining them to an action. The party claiming the right to interrupt the natural flow of a watercourse must show that such interruption is consistent with a reasonable exercise of his right as riparian owner (2).

A riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow for any purpose to the prejudice of any other riparian proprietor. The upper of two riparian proprietors on the same stream may divert the water on his own land by an artificial channel, provided he restore it to the natural channel before it leaves his land with reasonable care and prudence and without injury to the lower riparian proprietors. But the diversion by a riparian proprietor of any portion of the stream without returning the water to its natural channel before it leaves his land is an illegal user, if any other riparian proprietor is prejudiced thereby (a). The diversion of water from a stream for the purpose of supplying a neighbouring town with water is not a lawful user of the water (b). So, again, a local authority has no power under sect. 51 of the Public Health Act, 1875, for the purpose of supplying water to its district to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by sect. 322 of the Act. By so altering the flow of water the local authority is "injuriously affecting," within the meaning of sect. 332,

Diversion of
water.

(2) *Bullard v. Saratoga, &c., way Co.*, 38 Amer. R. 452; *Canfield Co.*, 32 Sickels (Amer.) 529. See *v. Andrews*, 41 Amer. R. 828.
Clinton v. Myers, 7 Amer. R. 376; (b) *Swindon Waterworks Co. v. Wilts and Berks Canal, &c., Co.*, L. R. 7 H. L. 697; *Owen v. Davies*, W. N. (1874) 175; *Roberts v. Richards*, W. N. (1881) 156.
(a) *Luttrel's case*, 4 Co. Rep. 86 b; *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466; *Garwood v. Central, &c., Rail-*

Chap. VI.
Sect. 4.

the common law rights of such riparian proprietors, and will be restrained from so doing, without proof of sensible damage caused thereby (c).

As between two riparian proprietors, each is entitled to use one half of the water (d). But the stream itself is indivisible. The stream can be used by each only as an entire stream in its natural channel, and there can be no severance (e). If an island divides the stream so that only a small portion of the stream descends on one side of the island and the residue on the other, the owner of the bank where the greater quantity of water flows is entitled to the use of the whole quantity flowing there, and the owner of the bank where the smaller quantity flows is entitled to no more of the water than naturally runs between his bank and the island, and has no right to place obstructions at the head of the island for the purpose of causing one half of the stream to descend on his side of the river (f).

Stream at the
source.

Where a spring of water arises on a man's land, he may, it seems, use it as he does any other property, which is the produce of his estate, without regard to the convenience or advantage of his neighbour, *provided that* the water is not at its source a watercourse. But if a stream begins to flow at the spring head in a defined channel, the rights incidental to streams of running water attach to it at the source (g). The rights of a riparian proprietor in respect of a natural stream extends to its tributaries or feeders flowing in defined channels or watercourses, but do not extend to water flowing over or soaking through land previous to its arrival at a stream (h).

Stream flowing
from under-
ground.

The same principles which apply to natural streams flowing in a defined channel over the surface are also applicable to

(c) *Roberts v. Gwyrfar District Council*, (1899) 2 Ch. 608; and see *Mostyn v. Atherton*, (1899) 2 Ch. 360.

(d) *Pratt v. Lamson*, 2 Allen (Amer.) 275.

(e) *Vanderbergh v. Van Bergen*, 13 Johns (Amer.) 212; *Webb v. Portland Manufacturing Co.*, 3 Sumn. (Amer.) 189.

(f) *Crooker v. Bragg*, 10 Wend. (Amer.) 260.

(g) *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Bunting v. Hicks*, 70 L. T. 455 (C. A.); *Mostyn v. Atherton*, (1899) 2 Ch. 360.

(h) *Broadbent v. Ramsbotham*, 11 Exch. 617; *Lord Blantyre v. Dunn*, 10 Dec. of Ct. of Sess., 2nd series, p. 509.

streams flowing from under the ground in a distinct and well-defined channel. The right in the latter case is equally a right *ex jure naturae*, and is incident to the adjacent land as a beneficial adjunct (*i*). But it seems that the right does not exist in the case of underground water flowing in a defined but unknown channel (*j*).

A riparian proprietor has a right to have the water of a natural stream run through his land in a natural state of purity (*k*). He may maintain an action to restrain the fouling of the water without showing that the fouling is actually injurious to him (*l*). The pollution or fouling of a stream is a ground of action against a particular person, even although other persons may have so fouled the water, that the acts of the defendant may not have rendered it less applicable to useful purposes than it was before. The damage is an injury to a right, and is therefore actionable (*m*). The pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage which would, however, at once become both injury and damage on the cessation of the other pollution (*n*).

The right to affect the quantity, the quality, or the flow of

(*i*) *Wood v. Waud*, 3 Exch. 748; *Dickenson v. Grand Junction Railway Co.*, 7 Exch. 300, *per* Pollock, C. B.; *Chasemore v. Richards*, 7 H. L. C. 384, *per* Lord Chelmsford; *Hodgkinson v. Eddowes*, 4 B. & S. 229; *Grand Junction Canal Co. v. Sugar*, 6 Ch. 486; *Black v. Ballymena, &c., Commissioners*, 17 L. R. I. 459; and see *Mostyn v. Atherton*, (1899) 2 Ch. 360.

(*j*) *Bradford Corporation v. Ferrand*, (1902) 2 Ch. 655.

(*k*) *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466; *Wright v. Howard*, 1 Sim. & St. 190; 24 R. R. 169; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *John Young & Co. v. Bankier Distillery Co.*, (1893) A. C. 691. See

also the Rivers Pollution Prevention Acts, 1876 and 1893, and the Public Health Act, 1875, ss. 17, 69.

(*l*) *Crossley v. Lightowler*, 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co.*, 5 C. D. 772; and see *John Young & Co. v. Bankier Distillery Co.*, (1893) A. C. 691.

(*m*) *Wood v. Waud*, 3 Exch. 748; *Wood v. Sutcliffe*, 2 Sim. N. S. 163, 166; *Crossley v. Lightowler*, 3 Eq. 279; *ib.* 2 Ch. 481; *Att.-Gen. v. Leeds Corporation*, 5 Ch. 583; *Blair v. Deakin*, 57 L. T. 522, W. N. (1887) 148.

(*n*) *Pennington v. Brinsop Hall Coal Co.*, 5 C. D. p. 772.

Chap. VI.
Sect. 4.

water may be acquired by prescription (o). But the mere omission by a riparian proprietor to use the water of the stream does not impair his title, or confer any right thereto upon another. The right exists whether he exercises it or not. He may begin to exercise it whenever he will. It is not the non-user by a man of his right, but the adverse enjoyment by another during twenty years, which destroys the right (p). The time from which a prescriptive right begins to accrue is the time when the rights of another riparian proprietor is disturbed (q). As between two opposite riparian proprietors, the user by the one of the whole or the greater part of the water by means of structures erected upon and within the limits of his own estate is not an adverse possession, which will raise the presumption of grant, for riparian proprietors on the opposite banks of a stream stand to each other in the relation and with substantially the rights of tenants in common (r). To constitute adverse possession, the possession by the one must be so wholly inconsistent with the claim of the other as to amount to an actual ouster (s). The abstraction of water from a stream openly and under claim of right for a period of twenty years to a tenement not abutting on the stream will create no easement to have pure water flow down the stream to the point of abstraction (t).

Prescription Act
2 & 3 Will. IV.
c. 71.

The acquisition of new rights to water by long user comes within the provisions of the Prescription Act 2 & 3 Will. IV. c. 71. By the 2nd and 4th clauses of that Act the continuous enjoyment as of right (u) of a watercourse (x) or the use of water as an easement over or from any land or water for twenty

(o) *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466; *Sampson v. Hoddinott*, 1 C. B. N. S. 611; *Webb v. Bird*, 13 C. B. N. S. 843. See *Commissioners of French Hock v. Hugo*, 10 A. C. 346; *McIntyre Brothers v. McGavin*, (1893) A. C. 268.

(p) *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466; *Crossley v. Lightowler*, 3 Eq. 279.

(q) *Kensit v. Great Eastern Railway Co.*, 27 C. D. 122, 129.

(r) *Pratt v. Lamson*, 2 Allen (Amer.) 275; *Beauman v. Kinsella*, 8 Ir. C. L. 291.

(s) *Ib.* See *Stedman v. Smith*, 8 E. & B. 1.

(t) *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

(u) See *Gardner v. Hodyson's Kingston Breweries Co.*, (1900) 1 Ch. 592, (1901) 2 Ch. 198.

(x) See *Chamber Colliery Co. v. Hopwood*, 32 C. D. 558.

years next before the commencement of some suit or action in which the claim has been brought in question (*y*) without interruption acquiesced in for a year (*z*), is evidence from which a jury is justified in presuming a right, if the claim be otherwise good at common law (*a*).

Chap. VI.
Sect. 4.

A right may be acquired under the statute to interfere with the course of water either by damming it up and forcing it back upon the land above, or by transmitting it altered in quality or quantity or velocity to the inferior proprietor (*b*). A claim to discharge a stream of water either in its natural state or changed in quality over land (*c*), or to foul a stream by throwing rubbish into it (*d*), or by discharging into it sewage water (*e*), or water fouled in the process of manufacture (*f*), or generally to interfere with its purity to such an extent as to cause damage to another (*g*), is within the statute. So also a claim to go on the soil of another to clear a mill-stream and repair its banks (*h*), or turn the water into an artificial water-course (*i*), is within the statute. If a right to discharge water over the land of another in a specific channel be acquired by prescription, the obstruction of the channel by the owner of the servient tenement is an invasion of a legal right for which an action is maintainable without proof of actual perceptible damage (*k*).

Basements
in water.

Persons within the district where the custom of tin bounding prevails are not in a less favourable condition in reference to acquiring rights of water by prescription than in other parts of

(*y*) *Cooper v. Hubbuck*, 12 C. B. N. S. 456; *ante*, pp. 149, 150. N. 798; *Gaved v. Martyn*, 19 C. B. N. S. 732.

(*z*) *Ante*, p. 150; *Ennor v. Barwell*, 2 Giff. 420. (*e*) *Att.-Gen. v. Luton Board of Health*, 2 Jur. N. S. 181.

(*a*) *Gaved v. Martyn*, 19 C. B. N. S. 732. (*f*) *Moore v. Webb*, 1 C. B. N. S. 673; *Murgatroyd v. Robinson*, 7 E. & B. 391.

(*b*) *Wright v. Howard*, 1 Sim. & St. 190; 24 R. R. 169; *Sampson v. Hoddinott*, 1 C. B. N. S. 590. (*g*) *Weeks v. Heward*, 10 W. R. 557.

(*c*) *Wright v. Williams*, 1 M. & W. 77; 46 R. R. 265; *Briscoe v. Drought*, 11 Ir. C. L. 250. See *Arkwright v. Gell*, 5 M. & W. 203; 52 R. R. 671. (*h*) *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 E. & B. 996.

(*i*) *Beeston v. Weate*, 5 E. & B. 996. (*k*) *Claxton v. Claxton*, 1 R. 7 C. L. 23.

(*d*) *Carlyon v. Lovering*, 1 H. & L. 23.

Chap. VI.
Sect. 4.

Easements in
water.

Limits of the
right.

the country (*l*). The easement passes to the owner of the soil when the bounding comes to an end (*m*).

The right to affect the quality, the quantity, or the flow of water in a manner not justified by natural right is an easement, and is therefore subject to the general law of easements. The right becomes extinguished upon unity of seisin and possession of both tenements in the same person (*n*). The right when acquired by grant must be measured by the terms of the grant (*o*); when derived from prescription or under the statute, it must be measured by the actual enjoyment, and can only be commensurate with it. A man who has acquired a right by actual enjoyment is entitled to all which he has enjoyed during the prescribed period both to the same extent and in the same specific manner, but to nothing more (*p*). The user which originated the right must also be its measure (*q*). If a man has acquired the right to divert water in certain proportions, he cannot increase the proportions (*r*). So also if the enjoyment has been only upon certain days in the week, the water cannot be used on other days (*s*). So also a man who has gained a right to foul the waters of a stream cannot, if he enlarge his works, claim a right to discharge into the stream a greater quantity of fouled matter than he gained the right to discharge by user during the prescribed period (*t*). So also if a man has an artificial drain or sewer by which he drains either water or sewage into his neighbour's land, he cannot use that drain so as to drain another close or another house (*u*). So also if a prescriptive right has been acquired to send some sewage into the sewers of another district, the burden cannot be increased without the consent of the sanitary authority of the latter

(*l*) *Gaved v. Martyn*, 19 C. B. N. S. 732; *Ivimey v. Stocker*, 1 Ch. 396.

(*m*) *Ivimey v. Stocker*, *ib*.

(*n*) *Ewart v. Cochrane*, 4 Macq. 117; *Baird v. Fortune*, *ib*. 141; *ante*, p. 152.

(*o*) *Wood v. Saunders*, 10 Ch. 582.

(*p*) *Bealey v. Shaw*, 6 East, 208; 8 B. R. 466; *Davies v. Williams*, 16 Q. B. 558; *Goldsmid v. Tunbridge*

Wells Commissioners, 1 Ch. 352.

(*q*) *Crossley v. Lightowler*, 2 Ch. 481.

(*r*) *Brown v. Best*, 1 Wils. 174.

(*s*) *Strutt v. Boringdon*, 5 Esp. 56; 8 B. R. 834.

(*t*) *Moore v. Webb*, 1 C. B. N. S. 673.

(*u*) *Metropolitan Board of Works v. London and North Western Railway Co.*, 17 C. D. 246.

district (x). The fact that the inhabitants of a town may have acquired a prescriptive right to drain their houses into a stream does not give a public board acting on behalf of the community a right to discharge the sewage of the town into the stream, so as to cause riparian proprietors a greater amount of inconvenience than they were exposed to before (y).

Chap. VI.
Sect. 4.

But although the extent of a prescriptive right is limited by the actual enjoyment, the mode and manner in which the right is exercised need not be the same. A change in the mode and object of the use of the water is justifiable, provided the quantity taken be not sensibly increased or the quality sensibly affected, or the alteration be not such as to cast a greater burthen upon the other riparian proprietors. All that the law requires is that the rights of others be not sensibly or materially affected (z). Persons who have a right to navigate a canal are not limited to any mode of traction or propulsion. They may use steam power, provided it occasions no more than ordinary injury to the canal (a). So also the owner of a paper mill who has acquired a prescriptive right to foul a stream by discharging into it refuse and washings produced by the workings of rags, used for the purposes of the business, may introduce a new vegetable fibre for the purposes of the manufacture, instead of using rags, provided he does not thereby increase the pollution of the stream (b). The *onus* lies in the plaintiff of proving the increase of pollution (c).

Alteration in the
mode of use.

In determining whether a greater burden is cast on the

(x) *Att.-Gen. v. Acton Local Board*, 22 C. D. 221. See also *Brown v. Corporation of Dunstable*, (1899) 2 Ch. 378; *Islington Vestry v. Hornsey Urban District Council*, (1900) 1 Ch. 695 (C. A.).

(y) *Att.-Gen. v. Luton Board of Health*, 2 Jur. N. S. 180; *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 528; *Goldsmid v. Tunbridge Wells Commissioners*, 1 Ch. 349; *Brown v. Corporation of Dunstable*, (1899) 2 Ch. 378.

(z) *Luttrell's case*, 4 Co. R. 86 b.; *Saunders v. Newman*, 1 B. & Ald.

258; 19 R. R. 312; *Thomas v. Thomas*, 2 Cr. M. & R. 34; 41 R. R. 678; *Hall v. Swift*, 4 Bing. N. C. 381; 44 R. R. 728; *Harvey v. Walters*, L. R. 8 C. P. 164. Cf. *Royal Mail Steam Packet Co. v. George and Branday*, (1900) A. C. 480.

(a) *Case v. Midland Railway Co.*, 27 Beav. 247.

(b) *Baxendale v. M'Murray*, 2 Ch. 790; *Royal Mail Steam Packet Co. v. George and Branday*, (1900) A. C. 480.

(c) *Baxendale v. M'Murray*, 2 Ch. 790.

Chap. VI.
Sect. 4.

servient tenement by an alteration of the dominant tenement, the thing must be looked at from a reasonable point of view. A mere small alteration or addition to the burden would not be an illegal act (*d*).

Interruption.

If a man having a limited right in water exercises the right in excess (as where a man having a right to send clean water down a drain sends down foul water (*e*)), the person against whom it is exercised may obstruct the whole flow, if he cannot obstruct the part in excess without obstructing the whole. An action will not lie for the obstruction until the right has been reduced within its proper limits (*f*). If the part in excess can be separated, the party against whom it is exercised may not stop the whole flow (*g*).

Abandonment.

The right to an easement in water may be lost by abandonment, where the circumstances of the case are such that an intention to abandon the right permanently can be reasonably presumed (*h*). The right, however, is not lost by a temporary interruption from natural causes (*i*).

Artificial water-courses.

The rights and liabilities of parties in respect of artificial streams and watercourses are entirely distinct from the rights and liabilities of riparian proprietors in respect of natural streams and watercourses (*k*). The water in an artificial stream is the property of the party by whom it is created or caused to flow. If the stream so created is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing the flow is liable; but he may by long enjoyment gain a right to continue the discharge. His neighbour, however, cannot gain by long enjoyment a right to insist on the continuance of the discharge. The discharge of water for twenty years from a mine by a mine owner in the course

(*d*) *Wood v. Saunders*, 10 Ch. 582. *v. Jones*, 11 H. L. C. 290.

(*g*) *Hill v. Cock*, 26 L. T. 185.

(*e*) *Cawkwell v. Russell*, 26 L. J. Ex. 34.

(*h*) *Ante*, p. 152; *Crossley v. Lightowler*, 3 Eq. 292, 2 Ch. 482.

(*f*) *Cawkwell v. Russell*, 26 L. J. Ex. 34; *Blackburne v. Somers*, 5 L. R. 1. 5; *Watson v. Troughton*, 48 L. T. 508. See *Frechette v. St. Hyacinthe*, 9 A. C. 185. Cf. *Tapling*

(*i*) *Hall v. Swift*, 4 Bing. N. C. 381; 44 R. R. 728. See *Carr v. Foster*, 3 Q. B. 581.

(*k*) *Burrows v. Lang*, (1901) 2 Ch. 502, 507.

of his mining operations, or by a landowner from his drainage works, will give no right to a neighbour below who has enjoyed the benefit of the water, so as to preclude the mine owner from ceasing to pump out his mine after the ore shall have been exhausted, or from sending the water off in a different direction, or the landowner from altering the course or level of his drains (*l*). As between intermediate proprietors below the one by whom the artificial watercourse is created or caused to flow, the upper one may at first intercept the water, but after twenty years' use the lower proprietor gains a right to the flow as against the upper one (*m*).

The circumstances, however, under which an artificial water-course has been made, and the manner in which it has been used, may be such as to give the proprietors of land adjacent all the rights which they would have been entitled to claim as riparian proprietors, had it been a natural stream (*n*). If it appear that the stream was originally intended to have a permanent flow, or to be of a permanent character, or if the party by whom, or in whose behalf it was caused to flow can be shown to have abandoned permanently the works by which the flow was caused without intention to resume them, and to have given up all right to and control over the stream, such stream may become subject to the law of prescription, and the other laws relating to natural streams (*o*). Nor does a natural stream cease to be so by reason of its flowing for a part of its course over an artificial bed (*p*).

Artificial water-courses.

(*l*) *Arkwright v. Gell*, 5 M. & W. 203; 52 R. R. 671; *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Rawstron v. Taylor*, 11 Exch. 369.

(*m*) *Arkwright v. Gell*, 5 M. & W. 203; 52 R. R. 671; *Wood v. Waud*, 3 Exch. 748; *Briscoe v. Drought*, 11 Ir. C. L. 250.

(*n*) *Magor v. Chadwick*, 11 A. & E. 571; *Wood v. Waud*, 3 Exch. 748; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Nuttall v. Brucewell*, L. R. 2 Exch. 1; *Rameshur, &c.*,

Singh v. Koonig, 4 A. C. 121; *Roberts v. Richards*, 50 L. J. Ch. 301; *M'Evoy v. Great Northern Railway Co.*, (1900) 2 Ir. R. 325, 333; *Hanna v. Pollock*, (1898) 2 Ir. R. 532, (1900) 2 Ir. R. 664; *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.).

(*o*) *Gaved v. Martyn*, 19 C. B. N. S. 732; *Ivimey v. Stocker*, 1 Ch. 396; *Blackburne v. Somers*, 5 L. R. I. 7; *Rameshur, &c.*, *Singh v. Koonig*, 4 A. C. 121; and see *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.).

(*p*) *Beeston v. Weate*, 5 E. & B.

Chap. VI.
Sect. 4.

It is impossible, however, to create a new burden that is something short of an easement, that is to say, an easement which shall be enjoyed *nec per vim, nec clam, sed precario* (q). Where a right to an artificial watercourse is claimed by prescription, it is necessary to consider whether the watercourse was made for a permanent, or only a temporary purpose. If it was made for a temporary purpose, the enjoyment would be precarious, and prescription would not apply. The expression "a temporary purpose," within the meaning of the rule, is not confined to a purpose which happens to last in fact for only a few years, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end (r).

The rule that the purpose for which the waters of an artificial watercourse have been collected or caused to flow, is to be regarded in determining whether rights or interests can be acquired in them by other persons than those who collected them or caused them to flow, applies with still greater force to the waters of canals than to artificial watercourses of an ordinary character (s). A canal company having a duty imposed on it by the legislature to keep open the canal, the legislature must be taken at least *primâ facie* to have intended that the powers and control over the waters of the canal should be vested in the company (t). A canal company which has enjoyed for a number of years the flow of the surplus waters of another canal lying on a higher level, has no right to insist on the continuance of the flow (u). Nor can the water of a canal be abstracted by the adjacent proprietors, without the consent of the company (x). In *Attorney-General*

986; *Briscoe v. Drought*, 11 Ir. C. L. 250; *Gaved v. Martyn*, 19 C. B. N. S. 732.

(q) *Per Farwell, J.*, (1901) 2 Ch. 511.

(r) *Burrows v. Lang*, (1901) 2 Ch. 502, 508.

(s) *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co.*, 1 L. R. H. L. 254.

(t) *Ib.*

(u) *Ib.* See *Att.-Gen. v. Corporation of Plymouth*, 9 Beav. 67.

(x) *Rochdale Canal Co. v. King*, 14 Q. B. 122; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Swindon Waterworks Co. v. Wilts and Berks Canal, &c., Co.*, 7 L. R. H. L. 697.

v. Great Eastern Railway Co. (y), a railway company was restrained from taking a large quantity of water for the use of their stations, from a river under the control of conservators, credit being given to the evidence on their part that taking the water would impede the navigation against the evidence on the part of the company that taking such water would produce no appreciable injury.

(Chap. VI.
Sect. 4

The fouling of the water of an artificial watercourse is a species of injury which does not stand upon the same footing as the abstraction of it. Neither the party who originates the watercourse, nor the upper proprietors, nor the intermediate owners, may pollute the stream, so as to cast a greater burden on the proprietors below (*z*). The right, however, may be acquired by long use (*a*).

The principles which apply to water flowing in a known and defined channel do not apply to water of a temporary and casual character, which does not flow in a regular channel, or has no certain course, but which merely squanders itself over the surface of land (*b*). Water of this character may be drained away or appropriated before it reaches any defined channel of water (*c*).

As distinguished from water of a casual and temporary character, a watercourse is a flow of water usually flowing in a certain direction, and by a regular channel, having a bed, banks, and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbour (*d*). It is not requisite that the

Distinction
between a water-
course and water
of a casual
character.

(y) 6 Ch. 572.

(z) *Magor v. Chadwick*, 11 A. & E. 571; *Wood v. Waud*, 3 Exch. 748; *Blackburne v. Somers*, 5 L. R. 1. 7; *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.).

(a) *Magor v. Chadwick*, 11 A. & E. 571; *Wood v. Waud*, 3 Exch. 748; *Baily v. Clark*, (1902) 1 Ch. 649 (C. A.).

(b) *Broadbent v. Ramsbotham*, 11 Exch. 602; *Chasemore v. Richards*, 7 H. L. 349; *Bradford Corporation v. Pickles*, (1895) A. C. 587.

(c) *Ib.*; *Rawstron v. Taylor*, 11 Exch. 375. See *Manchester, Sheffield, and Lincolnshire Railway Co. v. Workson Board of Health*, 23 Beav. 198; *Holker v. Porritt*, L. R. 10 Ex. 61; *M'Nab v. Robertson*, (1897) A. C. 129. As to whether there is a right to drain underground water where the effect would be to cause a neighbour's land to subside, see *Jurdeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. pp. 239, 242, 243.

(d) *Briscoe v. Drought*, 11 Ir. C. L. 271, *per* Christian, J. See *Rex v.*

Chap. VI.
Sect. 4.

Subterranean
percolating
water.

stream should flow continuously : it may be dry at times, but it must have a well-defined and substantial existence (e). Water, though it may squander itself in flood-time over the surface, may nevertheless flow in a defined channel (f). So also water, though owing to the level character of the land it may spread out over a wide space without any apparent banks, still continues to be a watercourse, if it usually flows in a continuous current and passes over the surface to the land below (g).

The same principles which apply to water of a casual and temporary character which squanders itself over the surface, are equally, if not more strongly, applicable to subterranean water of the same casual and undefined description, which does not flow in a well-defined and known (gg) channel, but merely percolates or oozes through the soil more or less according to the quantity of rain that may chance to fall. A man may by operations on his own soil, or in the execution of works which he is authorised to make, intercept, drain away, and appropriate as much of such water as he pleases, notwithstanding the effect may be not only to prevent it reaching his neighbour's land, but even to cause the water already collected there in wells and ponds to percolate away, so as to leave his neighbour's land dry (h).

The right which a man has to divert or appropriate percolating water within his own land so as to deprive his neighbour of such water is the same whether his motive is *bonâ fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out (i). But he may

Inhabitants of Oxfordshire, 1 B. & A. 289, 301; *Taylor v. Corporation of St. Helens*, 6 C. D. 264; *M'Nab v. Robertson*, (1897) A. C. 129.

(e) *Luther v. Winnisimmet Co.*, 9 Cush. (Amer.) 171; *Ashley v. Wolcott*, 11 ib. 192; *Barkley v. Wilcox*, 40 Amer. R. 520.

(f) *Briscoe v. Drought*, 11 Ir. C. L. 250. See *Gibbs v. Williams*, 37 Amer. R. 241.

(g) *Macomber v. Godfrey*, 11 Amer. R. 349.

(gg) See *Bradford Corporation v. Ferrand*, (1902) 2 Ch. 655 (C. A.).

(h) *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349; *New River Co. v. Johnson*, 2 El. & El. 435; *Queen v. Metropolitan Board of Works*, 3 B. & S. 710; *Ewart v. Belfast Poor Law Guardians*, 9 L. R. I. 180; *Lybe's Appeal*, 51r Amer. R. 543.

(i) *Bradford Corporation v. Pickles*, (1895) 1 Ch. 145, (1895) A. C. 387. Cf. *Allen v. Flood*, (1898) A. C. 1.

not draw off the water flowing underground in a certain and well-defined channel through his neighbour's land. If he cannot get at the underground water without touching the water in a known (j) and defined channel, he cannot get it at all (k).

Chap. VI.
Sect. 4.

The case is different where polluted water penetrates into the earth on one man's land, and percolates through to the wells and springs of his neighbour. Though water percolating in the soil is a common reservoir or source which any landowner may intercept and appropriate, but in which no landowner has any property, no landowner has a right by any operations on his land to contaminate this common reservoir or source. Every owner of land under which such water percolates has a right to have it in its natural condition, and no one is entitled to interfere with that right by polluting that common source. A landowner has a right to draw up the water lying under his land in its natural condition, and may in the exercise of that natural right use pumps or other appliances for the purpose (l). In a case accordingly, where the plaintiff and the defendant had each a well on his land, and the defendant turned sewage into his well, which percolating through the soil polluted the water which the plaintiff pumped up from his well, an injunction was granted restraining the defendant from thus polluting the water which formed the supply of the plaintiff's well (m).

Pollution of
percolating
water.

When land is so located that water naturally or in the course of ordinary agricultural operations, such as by deep ploughing, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he build a wall at the upper part of his estate so as to prevent the water from descending on it, whereby the land above is damaged, there is an actionable injury. The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations,

Drainage.

- (j) See *Bradford Corporation v.* 217 (C. A.).
Ferrand, (1902) 2 Ch. 655 (C. A.). (l) *Ballard v. Tomlinson*, 29 C.
 (k) *Grand Junction Canal Co. v.* D. 115.
Shugar, 6 Ch. 486; *Jordeson v.* (m) 1b.
Sutton, &c., Gas Co., (1899) 2 Ch.

Chap. VI.
Sect. 4.

such as by deep ploughing, from land on a higher level. The upper proprietor may drain his land, and the proprietor below must receive the water so drained; but the upper proprietor may not, by adopting a particular system of drainage, or by introducing alterations in the mode of drainage, cause the drainage water to flow on his neighbour's land in an injurious manner, or obstruct the drainage of other lands by overloading the ancient drains with water (*n*).

Water in mines. A mineowner has a right to work his mines in the manner most convenient and beneficial to himself for the purpose of getting out the whole of the minerals from his mine, and is not responsible for any damage occasioned by water which flows by gravitation or natural causes into an adjoining mine, provided the mines have been worked with due skill in the usual and ordinary manner (*o*). It is immaterial that his own acts have conduced to produce the injury, if his acts have been only those of the proper and ordinary working of his own mine without default or negligence (*p*). But he may not pump water out of his mines into the adjoining mines, so as to increase the flow into them, or use any artificial means or do anything whereby water should be caused to go into the adjoining mines, which would not otherwise have arrived there by natural causes (*q*). Where for his own convenience he makes a new artificial water-course, he must take care that he constructs it in such a manner that it shall be capable of conveying off the water that might flow into it from all such floods or rainfalls as might reasonably be expected to happen in the locality (*r*). The owner of the

(*n*) *Dawson v. Paver*, 5 Ha. 415;
Smith v. Kenrick, 7 C. B. 515;
Hughes v. Anderson, 44 Amer. R.
148. See *Earl of Ripon v. Hobart*,
3 M. & K. 169; *Montgomerie v.*
Buchanan's Trustees, 15 Dec. of Ct.
of Sessn., 2nd series, p. 853; *Whalley*
v. Lancashire and Yorkshire Rail-
way Co., 13 Q. B. D. 131 (C. A.).

(*o*) *Smith v. Kenrick*, 7 C. B.
564; *Baird v. Williamson*, 15 C. B.
N. S. 376; *Wilson v. Waddell*, 2
App. Ca. 99.

(*p*) *Fletcher v. Smith*, 2 App. Ca.
781.

(*q*) *Baird v. Williamson*, 15 C. B.
N. S. 391; *Westminster Brymbo*
Coal, &c., Co. v. Clapton, 36 L. J.
Ch. 477; *Lomax v. Stott*, 39 L. J.
Ch. 835; *Crompton v. Lea*, 19 Eq.
115, 127; *West Cumberland Iron,*
&c., Co. v. Kenyon, 11 C. D. 782;
John Young & Co. v. Bankier Dis-
tillery Co., (1893) A. C. 691, 697.

(*r*) *Fletcher v. Smith*, 2 App. Ca.
781.

lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbour, have a barrier in the upper part of his mine to pen back the water (s). If the owner of the higher mine trespasses upon this barrier he is liable for the consequential damage, as well as for the value of the coal, but he is not bound to fill up the excavation which he has made (t). But in *Lord Mexborough v. Bower* (u), the tenant of a colliery was restrained in an action brought by the lessors from allowing a communication which he had opened into an adjoining mine, in breach of the covenants in the lease, to remain open.

If a man for his own purposes makes a reservoir on his land and collects water there, he must use all reasonable care to keep it safely there. If he does not do so, and the water escapes, he is answerable for all the damage which is the natural consequences of its escape (x), unless he can show that the escape was caused by an agent beyond his control, such as a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it (y); or unless what he has done, though it may in point of law be wrongful, has not caused any additional damage (z); or unless what has happened is only the inevitable result of what the legislature has authorised him to do (a); or unless the plaintiff has consented to the water being stored on the defendant's premises, and its escape

(s) *Baird v. Williamson*, 15 C. B. N. S. 392. See *Baird v. Monkland Iron and Steel Co.*, 24 Dec. of Ct. of Sessn., 2nd series, p. 1418.

(t) *Megg v. Deurden*, 12 Q. B. 576; *Powell v. Aiken*, 4 K. & J. 343; *Plant v. Stott*, 21 L. T. 106.

(u) 7 Beav. 127.

(x) *Rylands v. Fletcher*, L. R. 3 H. L. 339; *Snow v. Whitehead*, 27 C. D. 588. *Comp. Anderson v. Oppenheimer*, 5 Q. B. D. 607; *West Cumberland Iron, &c., Co. v. Kenyon*, 11 C. D. 782; *R. H. Buckley and Sons, Ltd. v. N. Buckley and Sons*, (1898) 2 Q. B. 608 (C. A.); *Blake*

v. Woolf, ib. 426, 428; and see *National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *E. & S. African Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. 381, where the principle was applied to the case of an electric current.

(y) *Nichols v. Marsland*, 2 Ex. D. 1; *Box v. Jubb*, 4 Ex. D. 76; see *Lady Rothes v. Kirkcaldy Waterworks*, 7 App. Ca. 694.

(z) *Thomas v. Birmingham Canal Co.*, 49 L. J. Q. B. 856.

(a) *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418, ante, pp. 128, 133.

Chap. VI.
Sect. 4.

has not been due to any negligence of the defendant (*b*). Moreover, where a man who has collected water for his own purposes, fails to exercise due care to keep it safely, and damage arises, it is no answer to say that the immediate cause of the damage was the act of a third person (*c*).

As between occupiers of different floors of the same house, the one is not liable for an escape of water to the premises of the other, unless negligence can be shown (*d*).

Flood water.

Proprietors on the banks of a river are entitled to protect their property from an invasion of water by building a bulwark, but they are not at liberty to conduct their operations so as to do any actual injury to the property on the opposite side of the river (*e*). One riparian proprietor may not dam or pen up water so as to flood or otherwise injuriously affect the lands of others (*f*), or by making embankments, or otherwise alter the ancient course of flood water, so as to throw it in greater quantity upon the land of his neighbour (*g*). In *Whalley v. Lancashire and Yorkshire Railway Company* (*h*) there had been an unprecedented rainfall, causing water to accumulate against the side of the railway company's embankment, and the company, in order to protect their embankment, cut trenches in it, by which the water flowed through and found its way on to the land of the plaintiff, which was on a lower level. The jury found that the cutting of the trenches was reasonably necessary for the protection of the defendant's property, and that it was not done negligently. The Court held, however, that, although the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land

(*b*) *Blake v. Woolf*, (1898) 2 Q. B. 426, 428. H. L. Sc. 47.

(*c*) *Evans v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 36 C. D. 626. (*f*) *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Williams v. Morland*, 2 B. & C. 910; *Ware v. Regent's Canal Co.*, 3 D. & J. 212.

(*d*) *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden*, L. R. 7 Q. B. 661, 665; *Anderson v. Oppenheimer*, 5 Q. B. D. 602 (C. A.); *Blake v. Woolf*, (1898) 2 Q. B. 426. (*g*) *Trafford v. Rex*, 8 Bing. 204; *Menzies v. Lord Breudalbane*, 3 Bligh. N. S. 414; *Wicks v. Hunt*, John. 372; *Lawrence v. Great Northern Railway Co.*, 16 Q. B. 643.

(*e*) *Bickett v. Morris*, L. R. 1 (*h*) 13 Q. B. D. 131 (C. A.).

to that of the plaintiff, and that the defendants were liable accordingly. It seems that a reversioner whose land is flooded cannot sue in respect of a mere temporary injury, though the selling value of his reversion is thereby diminished (i).

Chap. VI.
Sect. 4.

Rights to water may be created or modified by deed. If there is a deed of grant, the nature and extent of the interest and the rights and liabilities of the parties thereto are regulated wholly thereby, whether the water be a natural stream (k), or an artificial watercourse (l), or water of a casual and temporary character (m). The owner of land cannot, however, create rights in water unconnected with the ordinary use and enjoyment of land, so as to constitute property in the hands of the grantee. As between himself and his grantee the grant is good, but as against third parties it will not be enforced (n). A mere licensee of water, for instance, cannot maintain an action against a third party by whom the water has been polluted (o).

If Deed of grant of water.

An easement in water being an easement of a continuous nature, the right passes by implication of law without any general words of conveyance (and independently of sect. 6 of the Conveyancing Act, 1881) upon the grant of the land, house, or mill to which the easement is annexed (p). Where, accordingly, the owner of two mills upon the same stream demised the upper mill, he was held to have granted all such conveniences and rights over the lower mill as were necessary for the reasonable enjoyment of the upper mill in the state in which it was at the time of the demise (q). So, also, where a man being the owner of a house or building and of land

Implication of grant.

(i) *Rust v. Victoria Graving Dock Co.*, 36 C. D. 113.

(k) *Northam v. Hurley*, 1 E. & B. 665; *Sharp v. Waterhouse*, 7 E. & B. 816; *Walker v. Stewart*, 2 Macq. 424; *Taylor v. Corporation of St. Helens*, 6 C. D. 264; *Remfry v. Surveyor-General of Natal*, (1896) A. C. 558.

(l) *Lee v. Stevenson*, El. Bl. & El. 512; *Chadwick v. Marsden*, L. R. 2 Ex. 284; *Wood v. Saunders*, 10

Ch. 582; *Taylor v. Corporation of St. Helens*, 6 C. D. 264.

(m) *Rawston v. Taylor*, 11 Exch. 369; *Johnstown Cheese Co. v. Veghte*, 25 Amer. R. 125.

(n) *Laing v. Whaley*, 3 H. & N. 675, 901; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

(o) *Laing v. Whaley*, 3 H. & N. 675.

(p) *Watts v. Kelson*, 6 Ch. 174.

(q) *Hull v. Lund*, 1 H. & C. 676.

Chap. VI.
Sect. 4.

surrounding it, through which a conduit or drain from the house passed, sold the house or building, retaining the land, the right to use the drain or conduit was held to pass as a privilege annexed to the house or building and necessary to its beneficial use (r). So, also, where the owner of properties A and B made a drain from a tank on B to a lower tank on the same property, and laid pipes from the lower tank to cattle sheds on property A, for the purpose of supplying them with water, and afterwards sold A to the plaintiff, the right to have the accustomed flow of the watercourse through the pipes was held to pass by implication of law without regard to the purpose for which the plaintiff might wish to use it (s).

But a temporary and precarious easement, being a right unknown to the law, cannot pass by implied grant, or under the general words of sect. 6 of the Conveyancing Act, 1881. Where, accordingly, the owner of an ancient mill and a farm, the cattle of which were to some extent watered at an ancient watercourse diverted from a natural stream and running on the mill property alongside the farm, but constructed and maintained solely for the purposes of the mill, conveyed the farm to a purchaser without mentioning any water right, it was held that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right either by implied grant or under the Conveyancing Act, 1881, s. 6, to have it continued for his benefit, and no right to the use of the water (if any) therein (t).

Injunctions to
restrain diver-
sion of water.

Injunctions will be granted to protect the legal right to the proper flow of water in a natural stream (u). In *Ferrand v.*

(r) *Nicholas v. Chamberlain*, Cro. Jac. 121; *Ewart v. Cochrane*, 4 Macq. 117.

(s) *Watts v. Kelson*, 6 Ch. 175; see *Burrows v. Lang*, (1901) 2 Ch. p. 512.

(t) *Burrows v. Lang*, (1901) 2 Ch. 502.

(u) *Att.-Gen. v. Great Eastern Railway Co.*, 6 Ch. 577; *Grand Junction Canal Co. v. Shugar*, ib. 483; *Swindon Waterworks Co. v. Wilts and Berks Canal, &c., Co.*, L. R. 7 H. L. 697; *Roberts v. Richards*, W. N. (1881) 156, 50 L. J. Ch. 297. See, as to form of order, 1 Set. 592. See *Queen v. Darlington Board of Health*, 5 B.

Corporation of Bradford (x), a waterworks company, acting under the Waterworks Clauses Act, 1847, was restrained from diverting a stream without paying compensation for the same, or making a deposit and bond as required by the Lands Clauses Act, 8 Vict. c. 18, s. 85. Though merely nominal damages may have been recovered for the diversion of water, the Court will interfere and vindicate the right by perpetual injunction, if the act complained of would cause irreparable mischief or permanent injury, or would destroy a right (y). If necessary, the injunction will be in the mandatory form (z).

In *Goodhart v. Hyett* (a), where the owner of a house had for many years had a supply of water by pipes passing through the adjoining land under circumstances which created an easement, the owner of the adjoining land was restrained from building on the line of pipes on the ground that the means of access to the pipes would be materially interfered with and rendered more expensive.

Where substantial damage is shown, the Court will restrain the fouling and pollution of water (b). If there is a house upon the property drawing its supply from the stream, the fouling of the stream so as to render the water unfit for domestic or culinary purposes is substantial damage (c). So also is the pollution of water to such an extent as to render it unfit for cattle to drink (d), or for fish to live in (e), or for the purposes of manufacture (f). So also is the discharge of sewage matter

Injunctions to
restrain fouling
a stream.

& S. 515, 6 ib. 562; *Roberts v. Gwyrfai District Council*, (1899) 2 Ch. 608 (C. A.).

(x) 21 Beav. 412.

(y) *Rochdale Canal Co. v. King*, 2 Sim. N. S. 79, 87, 16 Beav. 630.

(z) *Harrop v. Hirst*, 1 Set. 593.

(a) 25 C. D. 182.

(b) *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Pennington v. Brinsop Hall Coal Co.*, 5 C. D. 772; *John Young & Co. v. Bankier Distillery Co.*, (1893) A. C. 691. See, as to the form of the order for an injunction,

Lingwood v. Stowmarket Co., 1 Eq. 77, 336; *Att.-Gen. v. Leeds Corporation*, 5 Ch. 589, 1 Set. 615.

(c) *Ib.*; *Goldamid v. Tunbridge Wells Commissioners*, 1 Ch. 349.

(d) *Ib.*; *Oldaker v. Hunt*, 6 D. M. & G. 376; *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 528.

(e) *Aldred's case*, 9 Co. R. 59 a.; *Oldaker v. Hunt*, 6 D. M. & G. 376; *Att.-Gen. v. Borough of Birmingham*, 4 K. & J. 528.

(f) *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Tipping v. Eckersley*, 2

into a stream so as to cause mud banks to be formed (g). So also may be the discharge of heated water into a stream (h). If the purity of a stream as claimed be in itself excessive, the Court will not interfere unless a prescriptive right be shown. Thus an injunction was refused in the absence of a prescriptive right being shown to restrain a surveyor of roads from draining a gravel pit into a stream which the plaintiff had been in the habit of using for the purpose of supplying water to his beds of watercresses (i).

In granting injunctions against the pollution of rivers by sewage matter, the practice is to grant an immediate injunction restraining any new communication with the river, but as to existing drains, to suspend the operation of the order for a longer or shorter period to enable the defendants to comply with the order by altering their works (k). Liberty to apply for a further suspension of the injunction is sometimes reserved (l); and if it be not reserved, further time is usually granted on the terms of paying the costs of the application.

In the case of injury to riparian rights from the pollution of water, the Court will not, except in special cases, award damages in lieu of an injunction (m).

Where plaintiffs obtained their water supply from a well by means of a pipe laid in a main road, the defendants, a gas company, who owned gas mains and pipes laid in the same road, were restrained from polluting such water supply by allowing gas to escape from their pipes (n). An injunction to

K. & J. 264; *Crossley v. Lightowler*, 2 Ch. 478; *Clowes v. Staffordshire Potteries, &c., Co.*, 8 Ch. 142; *John Young & Co. v. Bankier Distillery Co.*, (1893) A. C. 691.

(g) *Att.-Gen. v. Luton Board of Health*, 2 Jur. N. S. 180.

(h) *Tipping v. Eckersley*, 2 K. & J. 264.

(i) *Weeks v. Heward*, 10 W. R. 557.

(k) *Goldsmid v. Tunbridge Wells Commissioners*, 1 Ch. 349; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146;

Att.-Gen. v. Corporation of Leeds, 5 Ch. 583; *Pennington v. Brinsop Hall Coal Co.*, 5 C. D. 769, 774; *Att.-Gen. v. Acton Local Board*, 22 C. D. 221; *Att.-Gen. v. Finchley Local Board*, 3 T. L. R. 357; *Islington Vestry v. Hornsey Urban District Council*, (1900) 1 Ch. 695, 707.

(l) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146.

(m) *Pennington v. Brinsop Hall Coal Co.*, 5 C. D. p. 773.

(n) *Batcheller v. Tunbridge Wells Gas Co.*, 84 L. T. 765.

restrain the fouling will, if required by the circumstances of the case, be in the mandatory form (o). In *Spokes v. Banbury Board of Health* (p), a local board of health was restrained from causing or permitting sewage matter or water polluted therewith to pass through drains or channels under their control into a river (q).

Chap. VI.
Sect. 4.

The Court will not, however, grant a mandatory injunction against a public body in order merely to force them to do their duty. The proper function of a mandatory injunction is to force a defendant to cease continuing an act which is wrongful against an individual. If a local board do no act themselves to cause a nuisance, but merely permit a state of things to continue as it existed before the commencement of their powers, and neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction. The proper remedy is by the prerogative writ of mandamus (r). In dealing, moreover, with the question of restraining a public body from continuing a state of things which existed before the commencement of their powers, the Court must take into consideration the balance of convenience (s).

Mandatory
injunctions.

In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorising or directing sewage from their district to flow into the sewers of the plaintiff, the Court granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains, firstly, because to do so would cause serious inconvenience to the district, and secondly, because it was doubtful whether a local board have power to

(o) See *ante*, pp. 31 *et seq.*, as to mandatory injunctions.

(p) 1 Eq. 42.

(q) *Att.-Gen. v. Leeds Corporation*, 5 Ch. 589, 1 Set. 615; *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 161; *Att.-Gen. v. Corporation of Halifax*, 17 W. R. 1088, 1 Set. 616; *Stansfield v. Corporation of Bradford*, 1 Set. 616.

(r) *Glossop v. Heston and Isleworth Board of Health*, 12 C. D. 120; *Att.-Gen. v. Guardians, &c., of Dorking*, 20 C. D. 595; *Att.-Gen. v. Clerkenwell Vestry*, (1891) 3 Ch. 527, 537.

(s) *Att.-Gen. v. Guardians, &c., of Dorking*, 20 C. D. 595; *Islington Vestry v. Hornsey Urban District Council*, (1900) 1 Ch. 695 (C. A.).

Chap. VI.
Sect. 4.

stop up drains which they have once authorised to be connected with their drains (t). But where a third party was acting in violation of an agreement to pass surface water only through a pipe into the sewers of a sanitary authority, and was passing sewage matter, and it appeared to the Court that no special inconvenience would be caused to other neighbours, an injunction was granted at the suit of a private individual who had suffered injury to restrain the sanitary authority, on the ground that they could prevent any nuisance being caused by stopping up the pipe which was used in contravention of the agreement (u).

The duty imposed by 18 & 19 Vict. c. 120, s. 72, the Metropolis Local Management Act, 1855, on a district board to keep the sewers vested in them in such a condition as not to create a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence (x). The same is the case in regard to local bodies constituted by the Public Health Act, 1875 (y).

Injunctions to
restrain damage,
nuisance, &c.,
to canals ;

Other cases of nuisance to water which have been brought before the Court are obstructions or damage to canals (z). In *Attorney-General v. Great Eastern Railway Co. (a)*, a railway company were restrained from taking so much water from a non-tidal river under the care of conservators, as to interfere with the navigation. A canal company authorised but not ordered by Act of Parliament to supply their canal with water from a stream which was pure at the date of the Act, cannot after the stream has been made foul and polluted, though

(t) *Att.-Gen. v. Acton Local Board*, 22 C. D. 221; *Islington Vestry v. Hornsey Urban District Council*, (1900) 1 Ch. 695 (C. A.); *Brown v. Mayor, &c., of Dunstable*, (1899) 2 Ch. 378.

(u) *Charles v. Finchley Local Board*, 23 C. D. 773. Cf. *Att.-Gen. v. Clerkenwell Vestry*, (1891) 3 Ch. 527, 534.

(x) *Bateman v. Poplar Board of Works*, 37 C. D. 272.

(y) *Stretton's Derby Brewery Co. v. Mayor, &c., of Derby*, (1894) 1

Ch. 431; *Lambert v. Corporation of Lowestoft*, (1901) 1 Q. B. 590.

(z) *Blakemore v. Glamorganshire Canal Co.*, 1 M. & K. 154; *London and Birmingham Railway Co. v. Grand Junction Canal Co.*, 1 Ba. Ca. 224; *Manchester, Sheffield, &c., Railway Co. v. Worksop Board of Health*, 23 Beav. 198; *Case v. Midland Railway Co.*, 27 Beav. 247; *Swindon Waterworks Co. v. Wilts and Berks Canal, &c., Co.*, L. R. 7 H. L. 697.

(a) 6 Ch. 572.

by the act of others, go on supplying their canal from its water, if they cause thereby a public nuisance (*b*). It is no answer to say that the company did not pollute the water, they having the power to draw or not to draw the water into their canal as they please; or that by restraining the canal company a worse nuisance would be created; or that the company may be obliged to close their canal and expose themselves to an indictment on that ground (*c*). In *Attorney-General v. Mayor of Basingstoke* (*d*), a local sanitary authority was restrained from permitting sewage to pass into a canal.

The Court has also jurisdiction, on the ground of irreparable damage, to restrain a man through whose land an ancient weir was constructed which turned the waters of a mill stream into a mill race from preventing the mill-owner, who had a prescriptive right to the mill stream, from entering upon his land for the purpose of repairing the weir (*e*).

Notwithstanding the statutory remedy provided by sect. 68 of the Waterworks Clauses Act for the settlement of disputes by justices, and the special remedy given by sect. 48 against a company withholding water, the Court will grant an injunction to restrain a waterworks company from cutting off the supply of water to a house, but the injunction will only be granted on the plaintiff giving an undertaking to take immediate proceedings before the justices to have the question determined as to the proper amount to be paid by him for the water (*f*).

Important alterations have been made by the Rivers Pollution Acts, 1876 (*g*) and 1893 (*h*), in the law and procedure relating to the pollution of rivers. The jurisdiction of restraining by summary order offences in respect of river pollution is, by sects. 10 and 11 of the Act of 1876, given to the County Courts.

(*b*) *Att.-Gen. v. Proprietors of Bradford Canal*, 2 Eq. 71.

(*c*) *Ib*.

(*d*) 45 L. J. Ch. 727.

(*e*) See *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 E. & B. 986; *Roberts v. Rose*, 3 H. & C. 162. See further, as to damage to a mill race, *Coates v. Clarence Railway Co.*,

1 R. & M. 182; *Manser v. Northern and Eastern Counties Railway Co.*, 2 Ra. Ca. 380.

(*f*) *Hayward v. East India Waterworks Co.*, 28 C. D. 139; see *Stevens v. Chown*, (1901) 1 Ch. 894.

(*g*) 39 & 40 Vict. c. 75.

(*h*) 56 & 57 Vict. c. 31.

Chap. VI.
Sect. 5.

SECTION V.—PURPRESTURES.—NUISANCE TO NAVIGABLE
TIDAL WATERS.

Nuisance to
public right of
navigation.

AN invasion of or encroachment on the soil of the seashore or bed of an estuary or navigable tidal river, between high and low water mark, while the same remains in the Crown, is a purpresture (*i*). There is a wide difference between a purpresture and a nuisance. Although they may both co-exist, either may exist without the other. If the act complained of be a purpresture, it may be restrained at the suit of the Attorney-General, whether it be a nuisance or not. Being an encroachment on the soil of the Sovereign, like trespass on the soil of an individual, it will support an action irrespective of any damage which may accrue. But to constitute a public nuisance, damage to the public right of navigation or other public right must be shown to exist. If the act complained of be a mere purpresture without being at the same time a nuisance, the Court will usually direct an inquiry to be made whether it is more beneficial to the Crown to abate the purpresture or to suffer the erection to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done, for the Crown cannot sanction a public nuisance (*k*). It has no right to use its title to the soil so as to occasion a nuisance to its subjects, nor can it give any one a right to do so. Buildings or other erections which interfere with the public right of navigation over the water are nuisances at common law, whether made by the Crown or by a subject (*l*). The erection of a pier or embankment is not necessarily a nuisance. The true question in each case is, whether or not a damage accrues to the navigation in the particular locality (*m*). If an erection be a hindrance to the navigation, it is no defence that the public inconvenience is counterbalanced by the benefit to be afforded by it (*n*).

(*i*) See *Att.-Gen. v. Chamberlain*, 4 K. & J. 292.

(*k*) *Att.-Gen. v. Burridge*, 10 Price, 350; *Att.-Gen. v. Johnson*, 2 Wills, Ch. 87; *Att.-Gen. v. Lord Lonsdale*, 7 Eq. 377, 389; *Att.-Gen. v. Terry*,

9 Ch. 423. See, as to form of order, 1 Set. 595.

(*l*) *Ib.*; *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192.

(*m*) *Booth v. Ratté*, 15 A. C. 188.

(*n*) *Rer v. Ward*, 4 A. & E. 384;

The same principles apply with respect to nuisances arising from the discharge into navigable tidal rivers of matters injurious to health, as are applicable in the case of ordinary rivers (o). The right of drainage into the sea and navigable tidal rivers conferred by the Towns' Improvement Clauses Act, 1847, is subject to the condition that no nuisance be created (p).

Chap. VI.
Sect. 5.

Fouling a navigable river.

In a case where a man had, by erecting an embankment and enclosing the bed of a river, shut out and prevented the tide from reaching a mussel-bed and breeding-ground, the Court granted an injunction on the principle of irreparable damage, without deciding or entering upon the question as to the ownership of the soil (q).

Nuisance to a fishery.

The idea has been sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it; but so far as regards non-tidal rivers this is not the case. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it (r).

Fishing in public rivers.

The right of the Crown in navigable rivers is twofold: the right of property and the right of conservation. These rights are perfectly distinct, and may both be transferred and separated. The grant of the right of conservation does not carry with it the soil or bed of the river. The right of conservation, when retained by the Crown, is exercised by the Admiralty. No quay or encroachment can be made upon the soil or bed of a navigable river below high water mark, without the licence of the Admiralty or other person in whom the conservation is vested (s).

Conservation.

Reg. v. Betts, 16 Q. B. 1023; *Att.-Gen. v. Lord Lonsdale*, 7 Eq. 388; *Att.-Gen. v. Terry*, 9 Ch. 423. See, as to form of order, 1 Set. 595.

(o) *Att.-Gen. v. Mayor, &c., of Kingston-upon-Thames*, 34 L. J. Ch. 481.

(p) *Att.-Gen. v. Mayor, &c., of Kingston-upon-Thames*, 34 L. J. Ch. 481.

(q) *Bridges v. Highton*, 11 L. T. 653.

(r) *Smith v. Andrews*, (1891) 2 Ch. pp. 695, 696; *Blount v. Legard*, ib. 681 n.

(s) See, as to the powers of the Conservators of the Thames, the Thames Conservancy Act, 1894 (Local Act); *Kearns v. Cordwainers' Co.*, 6 C. B. N. S. 388; *Macey v.*

Chap. VI.
Sect. 5.

Commissioners
of Sewers.

The Commissioners of Sewers have long been invested with the power of determining where, and to what extent, public convenience will justify an obstruction to any arm or inlet of the sea or navigable river, and of otherwise controlling and regulating them as the exigencies of the public will require (t). Acting *bonâ fide* for the benefit of the levels, the Commissioners of Sewers may erect defences against the inroads of the sea, although they may cause the sea to flow with greater violence against the adjoining land (u).

Rights of
riparian owner.

A riparian owner on the banks of a tidal navigable river has the same right or natural easements which belong to a riparian proprietor on the banks of a natural stream above the flow of the tide. In the part of the river where the tide flows and reflows, the soil between high water mark and low water mark and the soil in the bed of the river are *primâ facie* vested in the Crown, but the public are entitled to the rights of navigation and fishing, and to use the shore, the property of the Crown, for the purpose of embarking and disembarking, and for other purposes auxiliary to their right of navigation and fishing. A riparian owner has the right of navigating the river as one of the public; but when the right of navigation is connected with an exclusive access to and from a particular wharf, it ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction (x).

Metropolitan Board of Works, 33 L. J. Ch. 377; *Att.-Gen. v. Conservators of Thames*, 1 H. & M. 1. Under their Acts the Thames Conservancy are owners of the soil and foreshore of the river for certain specified purposes only, and are not "owners" for the purposes of sect. 4 of the Public Health (London) Act, 1891. See *Thames Conservancy v. London Port Sanitary Authority*, (1894) 1 Q. B.

647. See as to whether an Act empowering a corporation to remove obstructions in a river confers the right of conservancy, *Corporation of Exeter v. Lord Devon*, 10 Eq. 233.

(t) *Callis on Sewers*, 25.

(u) *Rex v. Commissioners of Sewers, &c., for Pagham*, 8 B. & C. 355.

(x) *Lyon v. Fishmongers' Co.*, 1 App. Ca. 662. See *Bell v. Corporation of Quebec*, 5 App. Ca. 99.

A navigable river is a public highway navigable by all His Majesty's subjects in a reasonable manner and for a reasonable purpose. A riparian proprietor accordingly has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading at reasonable times and for a reasonable time and in a reasonable way; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises (y), though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises, if used as a wharf, nor to the free entrance to or exit from such premises if used as a dock by other vessels (z). A right on the part of the owners of fishing boats and other craft to fix moorings in the foreshore of tidal navigable waters may, upon evidence of immemorial user, be supported either as an ordinary incident of the navigation of such waters, or on the presumption of a legal origin by grant from the Crown of the foreshore subject to such user, or by presumption of a concession by a former owner of the foreshore to all persons navigating the waters to use the foreshore for fixing moorings (a). It seems that such a right might also, in the case of the river Thames, have been supported on presumption of regulations of the port authority of the port of London (a).

Chap. VI.
Sect. 5.
The right of
mooring on
navigable rivers.

The owner of land on the sea-shore is not bound at common law, apart from prescription, to keep in repair a sea-wall; nor is the mere fact that each frontager had always maintained the sea-wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, sufficient evidence to establish a prescriptive liability on the part of a frontager to maintain the wall for the protection of the adjoining landowners (b).

(y) *Original Hartlepool Collieries*

Co. v. Gibb, 5 C. D. 713.

(z) *Ib.*; and see *Barber v. Penley*, (1893) 2 Ch. 447, 453.

(a) *Att.-Gen. v. Wright*, (1897)

2 Q. B. 318 (C. A.).

(b) *Hudson v. Tabor*, 2 Q. B. D.

290; see *Fobbing Commissioners v. Queen*, 11 App. Ca. 449; and *Rundle*

v. Hearle, (1898) 2 Q. B. 83, 90.

Chap. VI.
Sect. 6.

Limited rights
of public in
foreshore.

Prima facie the Crown is entitled to every part of the foreshore (c). The public have the right to pass over the foreshore for the purposes of navigation or fishing; but the sands on the sea-shore are not to be regarded as in the full sense of the word a highway. The public have no right at common law to enter upon the shore when dry, except for the purposes of navigation or fishing; and accordingly the public have no right to cross the shore for the purposes of bathing or amusement (d).

Protection of
the foreshore.

It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers or by raising artificial barriers, and therefore, no subject is entitled to destroy a natural barrier against the sea; and if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it (e). In an action accordingly by the Attorney-General suing in behalf of the Crown, as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom so as to expose the land of the plaintiff to the inroads of the sea, although the shingle was removed for sale in a natural and ordinary user of the land (f).

SECTION VI.—NUISANCES TO RIGHTS OF WAY.

ANOTHER class of cases in which the interference of the Court by injunction may be sought are nuisances to rights of way (g). In an action to restrain the obstruction of an alleged private

(c) *Att.-Gen. v. Emmerson*, (1891) A. C. 649.

(d) *Blundell v. Catterall*, 5 B. & Ald. 268; *Llandudno Urban District Council v. Woods*, (1899) 2 Ch. pp. 708, 709.

(e) *Att.-Gen. v. Tomline*, 14 C. D. 58.

(f) *Ib.*; see *Laird v. Briggs*, 19 C. D. 22.

(g) *Gayford v. Moffatt*, 4 Ch. 133; *Watts v. Kelson*, 6 Ch. 173; *Thorpe v. Brumfitt*, 8 Ch. 650; *Neath Canal Co. v. Ynisarwed, &c.*, *Colliery Co.*, 10 Ch. 450; *Bradburn v. Morris*, 3 C. D. 812; *Wells v. London, Tilbury, &c., Railway Co.*, 5 C. D. 126; *Fritz v. Hobson*, 14 C. D. 542. See, as to form of order, 1 Set. 585—588.

right of way, the plaintiff ought to show in his statement of claim whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the *termini* of the way and its course (*h*).

Chap. VI.
Sect. 6.

A right of way may arise either by grant, express or implied, from the owner of the freehold or by prescription (*i*). Modes of acquiring the right.

If a right of way is appurtenant or annexed to land, it passes by a grant of the land to which it is appurtenant without any special words of conveyance (*k*). But if a way is not appurtenant to land, it will not pass by general words of conveyance, unless there be something in the deed or in the general circumstances of the case to show that the parties intended the words in a way other than their strict sense (*l*), or unless the right is necessary for the beneficial enjoyment of the premises for the purposes for which, according to the obvious intention of the parties, the grant was made (*m*). General words such as "appurtenants," "appertaining to," "belonging to," &c., are not sufficient to pass the right (*n*); nor would a mere reference in the deed to an intended way be sufficient to pass the way (*o*); but a conveyance of lands with "ways heretofore," or "therewith used or enjoyed," is as a general rule sufficient (*p*). Where there are two adjoining closes and there exists over one of them a formed and constructed road which is in fact used for the purpose of the other, and that

Grant.

(*h*) *Harris v. Jenkins*, 22 C. D. 481; and see *Spelding v. Fitzpatrick*, 38 C. D. 410 (C. A.).

(*i*) *Dodd v. Burchell*, 1 H. & C. 122; *Krehl v. Burrell*, 7 C. D. 551.

(*k*) *Skull v. Glenister*, 16 C. B. N. S. 81; see *Watts v. Kelson*, 6 Ch. 173; *Thorpe v. Brumfitt*, 8 Ch. 650; *Kay v. Oxley*, L. R. 10 Q. B. 365; and see C. A. 1881, s. 6.

(*l*) *James v. Plant*, 4 A. & E. 761; *Worthington v. Gimson*, 2 El. & El. 618; *Kay v. Oxley*, L. R. 10 Q. B. 361; *Brett v. Clowser*, 5 C. P. D. 382.

(*m*) *Kavunagh v. Coal Mining*

Co., 14 Ir. C. L. 82; *Thompson v. Waterlow*, 6 Eq. 36; *Bayley v. Great Western Railway Co.*, 26 C. D. 453. See *Watts v. Kelson*, 6 Ch. 166.

(*n*) *Plant v. James*, 5 B. & A. 794; *Pheysey v. Vicary*, 16 M. & W. 496; *Bolton v. Bolton*, 11 C. D. 971; *Re Peck and School Board for London*, (1893) 2 Ch. 315.

(*o*) *Harding v. Wilson*, 2 B. & C. 96; *Bolton v. Bolton*, 11 C. D. 971.

(*p*) *Plant v. James*, 5 B. & A. 794; *Worthington v. Gimson*, 2 El. & El. 624; *Kay v. Oxley*, L. R. 10 Q. B. 367.

Chap. VI.
Sect. 6.

other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass to the grantee even though that road had been constructed during the unity of possession of the two closes and had not existed previously (*q*). But if the way is not a defined road but is merely a way which has been used by the owner of two closes for his own convenience during unity of possession, it will not upon a severance taking place pass even under the words "used or enjoyed" (*r*). The mere fact however that the way did not exist as a right of way before unity of possession, will not prevent the Court from holding that a new right of way as appurtenant to the use of the premises is created (*s*).

Though as a general rule a right of way will not pass under the word "appurtenances" the case is different, if, under the circumstances of the case, the word "appurtenances" admits of a secondary meaning and is equivalent to rights "usually enjoyed" with the land conveyed (*t*).

It is upon the principle that upon the grant of a thing everything is impliedly granted which is necessary to enable the grantee to enjoy the subject of a grant, that a way of necessity passes with land when granted (*u*). The same principle which applies to the use of conveyances also applies to cases where a severance of a heritage takes place by will (*x*). One devisee, if necessary, may pass over land devised to another, in order to gain access to land which has been devised to himself (*y*).

(*q*) *Burkshire v. Grubb*, 18 C. D. 620; *Bayley v. Great Western Railway Co.*, 26 C. D. 457; *Nicholls v. N.*, W. N. (1900) p. 4, 81 L. T. 811.

(*r*) *Langley v. Hammond*, L. R. 3 Exch. 161; *Watts v. Kelson*, 6 Ch. 173; *Kay v. Oxley*, L. R. 10 Q. B. 361; *Brett v. Clowser*, 5 C. P. D. 382; *Re Peck and the School Board for London*, (1893) 2 Ch. 315.

(*s*) *Bayley v. Great Western Railway Co.*, 26 C. D. 455. See *Brown v. Alabaster*, 37 C. D. 490; *Nicholls*

v. N., W. N. (1900) p. 4, 81 L. T. 811.

(*t*) *Thomas v. Owen*, 20 Q. B. D. 225; *Nicholls v. N.*, W. N. (1900) p. 4, 81 L. T. 811.

(*u*) *Staple v. Heydon*, 6 Mod. 1; *Pearson v. Spencer*, 1 B. & S. 584.

(*x*) *Pheysey v. Vicary*, 16 M. & W. 484; *Polden v. Bastard*, L. R. 1 Q. B. 156; *Phillips v. Low*, (1892) 1 Ch. 47.

(*y*) *Pearson v. Spencer*, 1 B. & S. 584, 3 B. & S. 760.

Section 6 of the Conveyancing Act, 1881, under which general words are implied in conveyances of land, applies only to conveyances and does not affect contracts (z). Accordingly, under a contract for sale of land "with the appurtenances," the purchaser is only entitled to have such general words inserted in the conveyance as he would have been entitled to before the Conveyancing Act, 1881, came into operation; and if the general words implied by sect. 6 are more extensive than the contract the vendor is entitled to have them limited accordingly (z).

If a right of way be acquired by grant, the extent of the easement must be determined by the words of the grant (a). In construing the terms of a grant and its meaning with respect to the nature and extent of the easements that pass with it, reference is to be had to the existing state of things at the time of the grant (b), and what must be imputed to the parties as their intention at the time of the deed will be regarded (c). As a general rule, the grant of a right of way imports the grant of such a way as is reasonably necessary for the purposes for which it was granted. The grantee may use the way in such a manner as is necessary for its most commodious enjoyment (d). Thus under the grant of a way with liberty to make and lay causeways, and to use and enjoy the same with carts, waggons, and other carriages, and to carry coals, it was held that the grantee had a right to lay a framed waggon way (e). So also where the grant was made of a piece of land, as a foot or causeway, with other liberties, powers, and authorities incident to or appurtenant, needful or necessary

Limits of right
when acquired
by grant.

- (z) *Re Peck and School Board for London*, (1893) 2 Ch. 315. Vict. c. 41, s. 6.
(a) *Williams v. James*, L. R. 2 C. P. 581; *Watts v. Kelson*, 6 Ch. 166; *Cannon v. Villars*, 8 C. D. 420. (c) *Collins v. Slade*, 23 W. R. 200, W. N. (1874) 205.
(b) *Henning v. Burnett*, 8 Exch. 187; *Pearson v. Spencer*, 1 B. & S. 585; *Wood v. Saunders*, 10 Ch. 582; *Cannon v. Villars*, 8 C. D. 420; *Bayley v. Great Western Railway Co.*, 26 C. D. 453; 44 & 45 (d) *Senhouse v. Christian*, 1 T. R. 560; *Cannon v. Villars*, 8 C. D. 420. See *Abson v. Fenton*, 1 B. & C. 195; *Hughes v. Chester and Holyhead Railway Co.*, 3 D. F. & J. 352.
(e) *Senhouse v. Christian*, 1 T. R. 560.

Chap. VI.
Sect. 6.

to the use, occupation, or enjoyment of the said road, way or passage, it was held that the grantee had a right to put a piece of flagstone upon a part of the land in front of a door opened by him from his house (*f*). So also the grant of a wayleave to a coal mine comprises such a wayleave as will be reasonably sufficient to enable the grantee to get all the seams of coal at a reasonable profit. The right is not confined to such ways as were in use at the time of the grant. A railway may, it would appear, be laid down for the purpose (*g*). In a case where lessees were authorised to take and use full and sufficient rail or other ways, paths and passages to carry all or any of the coal, iron and ironstone, the produce of the mines demised or any other mines, it was held that they might lay down a railway for the carriage of coal raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the lease (*h*). The right, however, is limited to such ways as are reasonably necessary or proper for enabling the grantee to get at the things conveyed, and does not extend generally to making roads for other purposes (*i*). But if a right of way is granted over land in general terms, the grantee is not limited to a right of way for agricultural purposes. If houses are built upon the land, the grantee has a right of way for all reasonable purposes to all the houses which may be built on the land (*k*). So also where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant (*l*).

(*f*) *Gerard v. Cooke*, 2 B. & P. N. R. 109.

(*g*) *Dand v. Kingscote*, 6 M. & W. 174; *Proud v. Bates*, 34 L. J. Ch. 407; *Duke of Hamilton v. Graham*, L. R. 2 H. L. Sc. 169.

(*h*) *Bidder v. North Staffordshire Railway Co.*, 4 Q. B. D. 429.

(*i*) *Durham and Sunderland Rail-*

way Co. v. Walker, 2 Q. B. 940. See *Furrow v. Vansittart*, 1 R. Ca. 602; comp. *Bostock v. Sidebottom*, 18 Q. B. 813.

(*k*) *Newcomen v. Coulson*, 5 C. D. 133; see *Somerset v. Great Western Railway Co.*, 46 L. T. 884.

(*l*) *Finch v. Great Western Railway Co.*, 5 Ex. D. 254.

When the turning of a carriage or cart is necessary to the convenient enjoyment of the dominant premises, such a right of turning over a piece of land may be a part of the right of way to the dominant premises (*m*). Where a right of way is granted to "the owner and owners for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner, for the time being, of every part of the severed lands. If the land be parcelled out into allotments, every allottee would have a right of way (*n*). The grantee of a right of way has a right of way to enter upon the land of the grantor over which the way extends, for the purpose of making the grant effective, *i.e.*, so as to enable him to exercise the right granted to him. This includes not only the right of repairing, but the right of making a road. If a man grants another a right of carriage way over a field to his house, the grantee may enter on the field and make a carriage way over such portions of the field as will be sufficient to support a carriage and horses and the ordinary traffic of a carriage way (*o*).

The grant of a right of way to a house *primâ facie* extends to members of the grantee's family, his servants, visitors, guests, and tradespeople, although not expressly named (*oo*).

If a right of way be granted in express terms for a definite purpose, the grantee may not use the way beyond the terms of his grant. If a man has a right of way to one close of land, he may not use the way for the purpose of going to another close beyond it (*p*). Nor can a right of way granted for a carriage road to a dwelling-house be used for the purpose of driving cattle to a field (*q*). So also if a way be granted to a particular corner of a field, the grantee may not use it to enter his field at any other point (*r*), nor would the grantee of a way

Right cannot be used beyond the terms of the grant.

(*m*) *Knox v. Sansom*, 25 W. R. 864.

(*n*) *Newcomen v. Coulson*, 5 C. D. 133.

(*o*) *Ib.*

(*oo*) See *Baxendale v. North Lumbeth Liberal and Radical Club*, (1902) 2 Ch. 427, 429.

(*p*) *Senhouse v. Christian*, 1 T. R. 560; *Bowser v. Maclean*, 2 D. F. & J. 415. See *Duke of Hamilton v. Graham*, L. R. 2 H. L. Sc. 169.

(*q*) *Brunton v. Hall*, 1 Q. B. 792

Henning v. Burnett, 8 Exch. 187.

(*r*) *Henning v. Burnett*, *ib.*

Chap. VI.
Sect. 6.

be justified in making transverse roads across the land (s). So also the grant of a way "on foot or for horses, oxen, cattle and sheep," does not give the grantee a right to carry manure in a wheelbarrow, although he who wheels it travels on foot (t). So also the grant of a way for agricultural purposes is not a general right of way, but is one of a limited character. It does not include the right to transport coals (u), or lime from a quarry (x); so also the grant of a right of way to a field is a way for any purpose for which the field may be used, so long as it continues a field or an open space or is generally in the same predicament in which it was at the time of the grant, but it does not extend to a right of way to houses which may be afterwards erected on it (y).

If the grant of the way be not for a definite purpose, but be in general terms, the right of way may be used for whatever purposes the land is used, unless otherwise limited by the context (z).

But the grantee of a way is not necessarily limited to the use of the way, so long as the place to which it leads continues in the same predicament as it was in at the time of the grant. He cannot, however, by changing the character of the occupation of the land in respect of which the right of way exists impose a greater servitude upon the servient tenement. The question in each case is whether the alteration that may have taken place is of the substance or the mere quality of the thing, or whether, in other words, a more onerous burden is sought to be imposed upon the servient tenement (a). And in determining this question, the matter must be looked at from a reasonable point of view. A mere small alteration or addition to the burden

(s) *Senhouse v. Christian*, 1 T. R. 560.

(t) *Brunton v. Hall*, 1 Q. B. 792.

(u) *Cowling v. Higginson*, 4 M. & W. 245.

(x) *Jackson v. Stacey*, Holt, N. P. 455.

(y) *Allan v. Gomme*, 11 A. & E. 759; *Henning v. Burnett*, 8 Exch. 187; *South Metropolitan Cemetery*

Co. v. Eden, 16 C. B. 51; *Collins v. Slade*, 23 W. R. 200, W. N. (1874) 205.

(z) *South Metropolitan Cemetery Co. v. Eden*, 16 C. B. 51; *United Land Co. v. Great Eastern Railway Co.*, 10 Ch. 590; *Somerset v. Great Western Railway Co.*, 46 L. T. 884.

(a) *Allan v. Gomme*, 11 A. & E. 759.

will not be considered an illegal act (*b*). If, for instance, there be a grant of a right of way to a cottage, the right is not lost by reason of the cottage being altered (*c*). So also where a man having a right of way to his dwelling-house opened a small shop in one room of his house, it was held not to be such an alteration of the dominant tenement as would be an illegal excess of his right of way (*d*).

The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land, and is entitled to have this right protected by the Court so long as the obstruction exists without the necessity of proceeding against the grantor for the removal of the obstruction. The right exists as against a purchaser from the grantor with notice, and will be enforced by injunction (*e*).

The reservation of a right of way in a deed operates as an easement created by way of grant from the grantee to the grantor (*f*). The reservation implies such a wayleave as will be reasonably sufficient for carrying out the purposes for which the reservation was made (*g*). In *Bradburn v. Morris* (*h*), the owner of a field with a right of way to it through an occupation road, agreed to sell the surface of the field, reserving the minerals. The field had never been used for mining purposes, and the vendor did not appear to have any present intention of working the minerals. It was held that the vendor having had a right to use the road for agricultural purposes could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold. It was also held that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the Court would not interfere.

Deviation.

Reservation.

(*b*) *Wood v. Saunders*, 10 Ch. 582.

(*c*) *Henning v. Burnett*, 8 Exch. 187; *Skull v. Glenister*, 16 C. B. N. S. 81.

(*d*) *Sloan v. Holliday*, 30 L. T. 757.

(*e*) *Selby v. Nettleford*, 9 Ch. 111.

(*f*) *Durham and Sunderland Rail-*

way Co. v. Walker, 2 Q. B. 940;

Lord Dynevor v. Tennant, 33 C. D. 421, 13 A. C. 279.

(*g*) *Daul v. Kingscote*, 6 M. & W. 174; *Proud v. Bates*, 34 L. J. Ch. 407; *Bidder v. North Staffordshire*

Railway Co., 4 Q. B. D. 429.

(*h*) 3 C. D. 812.

Chap. VI.
Sect. 6.
Prescription.

A good title to a right of way may arise from proof of enjoyment from time immemorial (*i*), or for such time and under such circumstances as will satisfy the provisions of the Prescription Act, 2 & 3 Will. IV. c. 71. By the 2nd and 4th clauses of that Act, the continuous enjoyment as of right (*k*), of a way as an easement (*l*), for twenty years next before the commencement of some action, in which the claim has been brought in question, without interruption acquiesced in for a year (*n*), is evidence upon which a jury would be justified in presuming a right if the claim is otherwise good at common law (*o*). The fact that the occupiers of the dominant tenement in passing with carts from a particular point to a certain gate over a common, in which no definite road was marked out, did not keep to one line, but used several tracks, will not prevent their acquiring a right of way between that point and the gate (*p*).

Acquisition of
right of way by
a tenant against
a co-tenant.

It is a rule that a tenant cannot acquire an easement over land belonging to his landlord, for the possession and user by the tenant is the possession and user of his landlord (*q*). But it seems that under the Prescription Act a tenant can acquire an easement of way as against another tenant holding under the same landlord, although the right will not prevail against the landlord (*r*). In a case accordingly where one tenant had acquired a right of way as against another tenant holding under the same landlord, and the landlord sold both properties at one sale with a condition that they were subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby, it

(*i*) *Wimbledon and Putney Commissioners v. Dixon*, 1 C. D. 362.

(*k*) See *Tickle v. Brown*, 4 A. & E. 382; *Gardner v. Hodgson's Kingston Brewery Co.*, (1901) 2 Ch. 198 (C. A.).

(*l*) *Ante*, pp. 149, 150.

(*n*) *Ante*, pp. 150, 151.

(*o*) See *Hollins v. Verney*, 13 Q. B. D. 304.

(*p*) *Wimbledon and Putney Commissioners v. Dixon*, 1 C. D. 368.

(*q*) *Fahey v. Dwyer*, 4 L. R. Ir. 272; *Daniel v. Anderson*, 31 L. J. Ch. 610; *Gayford v. Moffatt*, 4 Ch. 133; *Outram v. Maude*, 17 C. D. 391.

(*r*) *Fahey v. Dwyer*, 4 L. R. I. 272. See *Daniel v. Anderson*, 31 L. J. Ch. 610; *Harris v. De Pinna*, 33 C. D. 252, 253. But *querre* whether these cases are consistent with the principle adopted in *Wheaton v. Maple*, (1893) 3 Ch. 48 (C. A.).

was held that the purchaser of the one tenement had no right of way as against the purchaser of the other tenement (s).

Chap. VI.
Sect. 6.

If a right of way be acquired by prescription, the character and extent of the easement is fixed and determined by the use and enjoyment under which it has been gained. The right acquired must be measured by the extent of the enjoyment which is proved. The purpose for which the way may be used is limited by the actual user which has taken place during the whole period necessary for the acquisition of the right. The right of way cannot be increased so as substantially to impose a greater burthen on the servient tenement (t). If the proof by usage be of a carriage way, a right of way for cattle is not necessarily established, though it may be competent evidence to go to a jury in connection with other evidence in establishing the extent of the right claimed (u). Nor will proof of usage of a way to bring goods to a tanyard, for the use of the tanyard, authorise the use of the way by other occupants, and for other purposes than the occupancy of the tanyard (x). Nor will proof of a prescriptive right to use a way in order to fetch water from a river, support a claim to use the way in order to fetch and carry goods (y), and a right to cart timber will not sustain a plea of a general right of way on foot, and with horses, waggons, and other carriages (z). Nor will proof of user for certain purposes necessarily prove a general right of way for all purposes; the user, for instance, of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes (a). But if it appear that a way has been actually enjoyed for all the purposes for which the use or enjoyment of the premises at different times required its exercise, it is such evidence of a general right to use it for all purposes as to be a ground for inferring such a right,

Limits of right
when acquired
by prescription.

(s) *Daniel v. Anderson*, 31 L. J. Ch. 610.

(t) *Williams v. James*, L. R. 2 C. P. 582; *Wimbledon and Putney Commissioners v. Dixon*, 1 C. D. 368.

(u) *Bullard v. Dyson*, 1 Taunt. 279.

(x) *Bower v. Hill*, 2 Bing. N. C. 339.

(y) *Knight v. Woore*, 3 Bing. N. C. 3.

(z) *Higham v. Rabbett*, 5 Bing. N. C. 622.

(a) *Bradburn v. Morris*, 3 C. D. 812 (C. A.).

Chap. VI.
Sect. 6.

although for some of these purposes it may appear that the way was first, in fact, used within the period of twenty years ^(b). But proof of user of a way for all purposes for which a road was wanted for the enjoyment of property in its original state will not establish a right for all purposes in an altered condition of the property, where the effect would be to impose a greater burden on the servient tenement. Where, accordingly, a road had been immemorially used to a farm, not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm, it was held that that did not establish a right of way for carting the materials required for building a number of new houses on the land ^(c).

Ways of
necessity.

A right of way arises from necessity, where a man having a close, which is wholly surrounded by his land, sells the close. In such case the grantee is held by implication of law to have a way over the grantor's land, as a necessary incident to the grant, for without the way the grant would be useless ^(d). The principle has been carried so far as to be applied to the case of a trustee selling land he held in trust, and to which there was no access but over the trustee's own land ^(e). The principle, it appears, is applicable, if the close granted be not entirely surrounded by the land of the grantor, but partly by the land of a stranger ^(f). So, also, and upon the same principle, if a man grants trees growing on his land to another, the grantee may enter upon the land for the cutting them down and carrying them away ^(g). So, also, where trees have been excepted by the lessor on an estate demised, the law gives him, and those claiming under him, power, as incident to the exception, to

^(b) *Cowling v. Higginson*, 4 M. & W. 248; *Dare v. Heathcoate*, 25 L. J. Ex. 245.

^(c) *Wimbledon and Putney Commissioners v. Dixon*, 1 C. D. 362 (C. A.).

^(d) *Clark v. Cogge*, Cro. Jac. 170; *Gayford v. Moffatt*, 4 Ch. 133, ante, p. 212.

^(e) *Howton v. Frearson*, 8 T. R. 50.

^(f) 2 Roll. Ab. 60; *Osborne v. Wise*, 7 C. & P. 763. But see *Titchmarsh v. Royston Water Co.*, W. N. (1899) p. 256, 81 L. T. 673.

^(g) Plowd. Comm. 16.

enter upon and cut the trees (*h*). So, also, if a man gives another a licence to lay pipes of lead in his land, to convey water to a cistern, he may enter upon the land and dig therein to clean or mend the pipes (*i*); and an injunction will be granted, if necessary, to protect the easement (*k*).

The grant that carries with it a right of way by necessity, does not necessarily imply a carriage way, even though the thing granted is a house. But the grant of tillage land implies a carriage way, because such a way is necessary in order to carry off the crops, unless by the custom of the vicinage the crops are carried off by men instead of teams (*l*).

A way of necessity arises also by implication of law, where a man, having several closes of land, sells all but one, which is completely surrounded by those which he has sold. In such cases, a right of way by necessity over the surrounding closes which he has sold is presumed by implication of law to be reserved in favour of the grantor (*m*). In a case where the purchaser of a close of land had notice that the adjoining land retained by the vendor was to be laid out in building, in a manner which would make a right of way over the purchased land necessary to the vendor, it was held that such right of way was reserved to the vendor by implication as a way of necessity (*n*). But if the close retained by the vendor is agricultural land and the purchaser has no notice that the vendor intends to lay it out in building, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition. He cannot claim a right of way suitable to the user of the close as building land (*o*). Where the owner of several closes of land had executed deeds of conveyance to three purchasers on the same day, it was held that

Ways of
necessity.

(*h*) *Liford's case*, 11 Co. Rep. 51 b, 52 a; *Darcy v. Askwith*, Hob. 234.

(*i*) *Pomfret v. Ricroft*, 1 Willms. Saund. 321.

(*k*) *Goodhart v. Hyett*, 25 C. D. 182.

(*l*) *Osborne v. Wise*, 7 C. & P. 763.

(*m*) *Clark v. Cogge*, Cro. Jac.

170; *Pinnington v. Gulland*, 9 Exch. 1. See *Russell v. Watts*, 25 C. D. 572.

(*n*) *Davies v. Sear*, 7 Eq. 427. See *Wheeldon v. Burrows*, 12 C. D. 58; *Serff v. Acton Local Board*, 31 C. D. 681.

(*o*) *Corporation of London v. Riggs*, 13 C. D. 798.

Chap. VI.
Sect. 6.

Ways of
necessity.

the purchasers were entitled to rights of way, independently of any special grant or reservation of any particular way (*p*).

A man cannot claim a way by necessity by reason of its superior convenience over another way which he has (*r*). Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor and there are to the tenement granted more ways than one, the grantee is entitled to one way only which the grantor may select (*s*). There may be, it would appear, a way of necessity, at least in favour of a grantee of land, even although there be no absolute necessity for the right claimed. The right may be implied where a tenement is so constructed as that part of it involves a necessary dependence on other parts, in order to its enjoyment in the state in which it was at the time of the grant (*t*). It would seem, however, that a reservation of a right of way in favour of a grantor will not arise from implication of law, unless the way be one of absolute necessity (*u*). In *Holmes v. Goring* (*x*) it was laid down that a way of necessity is limited by the necessity which created it, and will cease if, at any subsequent period, the party entitled to it can approach the place to which it led by passing over his own land. But in *Proctor v. Hodgson* (*y*), Lord Wensleydale said he considered the Court was wrong in *Holmes v. Goring*, and that he should have thought that an implied way of necessity "meant as much a grant for ever as if expressly inserted in the deed."

Direction of way
of necessity.

The authorities determine that the person by whose act a way of necessity is created, in other words the grantor, should designate the way, subject, however, to this, that the way should be a reasonable and convenient one (*z*). In general,

(*p*) *Pinnington v. Galland*, 9 Exch. 1.

(*r*) *Morris v. Edgington*, 3 Taunt. 31; *Pheysey v. Vicary*, 16 M. & W. 495, per Alderson, B.; *Dodd v. Burchell*, 1 H. & C. 119.

(*s*) *Bolton v. Bolton*, 11 C. D. 971.

(*t*) *Pearson v. Spencer*, 3 B. & S. 760. Comp. *Espley v. Wilkes*, L. R. 7 Ex. 303.

(*u*) *Suffield v. Brown*, 4 D. J. & S. 185; and see *Taws v. Knowles*, (1891) 2 Q. B. 564 (C. A.); *Union Lighterage Co. v. London Graving Dock Co.*, (1902) 2 Ch. 557, 570 (C. A.). See, also, *ante*, p. 146.

(*x*) 2 Bing. 76.

(*y*) 10 Exch. 828; and see *Pheysey v. Vicary*, 16 M. & W. 491.

(*z*) *Clarke v. Rugge*, 2 Roll. Ab.

especially in cases where there is an occupation by a tenant, there must be an actual existing way, by which the premises are used and enjoyed; and in such case the intention of the testator, if the severance of the heritage be by will, is best effectuated by construing the implied grant of a way to be a grant of that way actually used at the time of his death (*a*). It is difficult to say how the way ought to be set out if the premises before severance are so occupied as to afford no indication of what was the usual way in the testator's lifetime (*b*). A way by necessity, when once created, must remain the same so long as it continues at all (*c*). The person into whose possession the servient tenement comes may not at his pleasure vary from time to time the direction of the way so long as he substitutes a more convenient one (*d*). If there are two ways, each of necessity, the owner of the dominant tenement will be entitled to that which is most convenient to him (*e*).

The right to an easement of way may be lost by abandonment. Mere non-user of a way, however, does not amount to abandonment. The question of abandonment is one of intention, to be decided on the facts of each particular case. No definite time has been fixed by law during which a cessation of enjoyment must continue in order to amount to evidence of abandonment. The question always is whether, under the circumstances of the case, an intention to abandon the right permanently can be reasonably presumed. The mere suspension of the exercise of the right is not sufficient to prove an intention to abandon it. The period of time during which the non-user has continued is only material as an element in forming a presumption as to the intention. What period may be sufficient in any particular case must depend on all the accompanying evidence (*f*). In *Ward v. Ward* (*g*), accordingly,

Abandonment
and non-user.

- | | |
|---|---|
| 60; <i>Pearson v. Spencer</i> , 1 B. & S. | 571, 3 B. & S. 761. |
| 571; <i>Bolton v. Bolton</i> , 11 C. D. | (<i>d</i>) <i>Ib</i> . |
| 971; and see <i>Re Peck and The School</i> | (<i>e</i>) <i>Morris v. Edgington</i> , 3 Taunt. |
| <i>Board for London</i> , (1893) 2 Ch. | 24, 31; <i>Barlow v. Rhodes</i> , 1 Cr. & |
| p. 320, <i>per</i> Chitty, J. | M. 439; <i>Pheysey v. Vicary</i> , 16 M. |
| (<i>a</i>) <i>Pearson v. Spencer</i> , 1 B. & S. 585. | & W. 484, 492, 495. |
| (<i>b</i>) <i>Ib</i> . 3 B. & S. 761. | (<i>f</i>) <i>Reg. v. Chorley</i> , 12 Q. B. 519. |
| (<i>c</i>) <i>Pearson v. Spencer</i> , 1 B. & S. | (<i>g</i>) 7 Exch. 838. |

Chap. VI.
Sect. 6.

it was held that a right of way was not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party having a more convenient way. So, also, a parol agreement for the substitution of a new way for an old one, and a consequent discontinuance to use the old way, were held not to afford evidence of an intention to abandon the old way (*h*).

The mere manifestation of an intention to abandon the right, is not necessarily sufficient to destroy the right (*i*). But if the dominant owner does anything showing a clear intention of abandoning the right it cannot be afterwards set up (*k*). So again, if an intention to abandon the right can be reasonably presumed, and the owner of the servient tenement, upon the faith of such a belief, has been induced to incur expense or alter his condition, the owner of the dominant tenement will be held to have precluded himself by his conduct from afterwards setting up that the right has not been abandoned (*l*).

Where the owner of two adjoining tenements over one of which there is a way from the other not being a way of necessity, mortgages the *quasi* servient tenement without expressly reserving a right of way, such right cannot be subsequently set up (*m*).

Extinguishment
and merger.

A right of way enjoyed by the owner of one tenement over another tenement becomes, like other easements, extinguished upon unity of seisin and possession of both tenements in the same person, and merges in the general rights of property (*n*). A private right of way, however, is not necessarily merged and extinguished in a public right of way, if the latter right is acquired over the same soil where the private right exists. It is, therefore, no answer to an action for obstructing a private right of way to say that a public right of way has been acquired over the same road (*o*).

(*h*) *Lovell v. Smith*, 3 C. B. N. S. 120.

(*i*) *Moore v. Rawson*, 3 B. & C. 332; *Young v. Star Omnibus Co.*, 86 L. T. 41.

(*k*) *Midland Railway Co. v. Gribble*, (1895) 2 Ch. 827, 831 (C.A.).

(*l*) *Reg. v. Chorley*, 12 Q. B. 517.

(*m*) *Taws v. Knowles*, (1891) 2 Q. B. 564 (C.A.).

(*n*) *James v. Plant*, 4 A. & E. 766; and see *Damper v. Bassett*, (1901) 2 Ch. 350.

(*o*) *Allen v. Ormond*, 8 East, 4;

The General Inclosure Act, 8 & 9 Vict. c. 118, declares that all roads and ways not set out by the valuer in making his award shall be for ever stopped up and extinguished (*p*).

Chap. VI.
Sect. 6.

The right of the owner of roadside property to have access thereto is a totally different right from the public right of passing and re-passing along the highway. The right of a man to step from his own land on to a highway is quite a different right from the public right of using the highway (*q*). If a private way leads into a public road, an action will lie for obstruction of the private way, although the obstruction is actually placed in the public road (*r*). But the *private* right of access which the owner of property adjoining a highway is entitled to does not extend to the carriage of goods to and from his premises. The right of such owner to carry goods across the pavement to or from the highway, is a right enjoyed by him *as one of the public*. It is in fact part of the right so to use the highway at the spot in question as to enjoy the same reasonably in common with other members of the public entitled to use the same (*s*).

Obstruction of private way by obstruction in a public road.

In *Thorpe v. Brumfitt* (*t*) the continual obstruction of a private way to an inn-yard, by loading and unloading waggons, was restrained by injunction; although the obstructions were not created by one defendant alone, but by several who had warehouses abutting on the way, and although the obstruction created by each separately might not have been sufficient of itself to support the action (*u*).

Where a local board is a highway authority, it has the power

Duncan v. Louch, 6 Q. B. 915, *per* Patteson, J. *Comp. Teebay v. Manchester, &c., Railway Co.*, 24 C. D. 572.

(*p*) *Turner v. Crush*, 4 App. Ca. 221.

(*q*) *Att.-Gen. v. Conservator of Thames*, 1 H. & M. 31, *per* Lord Hatherley; *Chaplin & Co., Ltd. v. Westminster Corporation*, (1901) 2 Ch. 329.

(*r*) *Rose v. Groves*, 5 M. & G. 613; *Lyon v. Fishmongers' Co.*, 1

App. Ca. 662; *Benjamin v. Storr*, L. R. 9 C. P. 406; *Original Hartlepool Collieries Co. v. Gibb*, 5 C. D. 721; *Fritz v. Hobson*, 14 C. D. 542; *Caledonian, &c., Railway Co. v. Walker's Trustees*, 7 App. Ca. 285.

(*s*) *Chaplin & Co., Ltd. v. Westminster Corporation*, (1901) 2 Ch. 329.

(*t*) 8 Ch. 650.

(*u*) See also *Lambton v. Mellish*, (1894) 3 Ch. 163, 166.

Chap. VI.
Sect. 7.

to alter for the accommodation of the public the level of any street, though such alteration may interfere with the free access of the adjoining owners to their property abutting on the street. Any remedy that the adjoining owners may have except on the ground of unreasonable conduct on the part of the local authority should be by way of compensation under sect. 308 of the Public Health Act, 1875, and not by injunction (*x*).

SECTION VII.—NUISANCES TO HIGHWAYS.

ANOTHER class of cases in which the equitable remedy by injunction is often sought are nuisances to public roads or highways (*y*).

What is a
highway.

A highway is a road given to the public for passing from one public place to another public place (*z*), whether it be a carriage way, a footway, or a horse-and-cart way (*a*). A highway need not necessarily be a thoroughfare (*b*), nor is it necessary that the terminus of a highway should be itself a public place, if it lead to a public place (*c*). The sea-shore is not a public highway (*d*).

Modes of
creating a
highway.

A highway may be created either by statute or by the dedication to the public by the owner in fee (or in certain cases by a limited owner (*e*)) of the surface of his land for the purpose of passing and re-passing. In order to prove a public

(*x*) *Sellers v. Matlock Board of Health*, 14 Q. B. D. 929.

(*y*) *Squire v. Campbell*, 1 M. & C. 486; *Att.-Gen. v. Forbes*, 2 M. & C. 133; *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Dover Gas Co. v. Mayor, &c., of Dover*, 7 D. M. & G. 545; *Mott v. Shoolbred*, 20 Eq. 24; *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 C. D. 752; *Att.-Gen. v. Brighton, &c., Supply Association*, (1900) 1 Ch. 276 (C. A.).

(*z*) *Campbell v. Lang*, 1 Macq. 451; *Bourke v. Davis*, 44 C. D. 110, 121; *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142 (C. A.); *Hick-*

man v. Maisey, (1900) 1 Q. B. 752 (C. A.).

(*a*) 13 East, 97, *per* Lord Ellenborough; 2 B. & Ald. 648, *per* Holroyd, J.

(*b*) *Bateman v. Bluck*, 18 Q. B. 870; *Young v. Cuthbertson*, 1 Macq. 455; *Vernon v. Vestry of St. James*, 16 C. D. 457; *Bourke v. Davis*, 44 C. D. 110, 123.

(*c*) *Campbell v. Lang*, 1 Macq. 451.

(*d*) *Llandudno Urban Council v. Woods*, (1899) 2 Ch. 705.

(*e*) See sect. 16 of Settled Land Act, 1882, and sect. 20 of Settled Estates Act, 1877.

way created by Act of Parliament, it is necessary to show that the provisions of the Act have been strictly followed (*f*).

Chap. VI.
Sect. 7.

The dedication by an owner of the surface of his land to the use of the public, has not the effect of divesting him of the ownership of the soil, or of vesting the soil in the public, or in the Crown to the use of the public. An owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent with such dedication. Highways are dedicated *prima facie* for the purpose of passage only, and the user of a highway for other purposes is a trespass as against the owner of the soil and will be restrained (*g*). The appropriation made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public. The provision of the Highway and Metropolis Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner (*h*).

A dedication to be valid must be made by the owner of the fee (*i*), or by a limited owner under statutory powers (*k*), and must be made with an intention to dedicate. There can be no dedication, unless there be an intention to dedicate (*l*); and such intention must be unequivocally proved. But it may be manifested by writing, by declaration, or by acts. The mere acting so as to lead persons into a supposition that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction (*m*). Nor is there a dedication,

(*f*) *Cubitt v. Mazze*, L. R. 8 C. P. 715.

(*g*) *Hickman v. Maisey*, (1900) 1 Q. B. 752 (C. A.).

(*h*) *Vestry of St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47; and see *Luscombe v. Great Western Railway*, (1899) 2 Q. B. p. 316.

(*i*) *Wood v. Veal*, 5 B. & Ald.

454; *Jarvis v. Dean*, 3 Bing. 447.

(*k*) See Settled Land Act, 1882, s. 16, and Settled Estates Act, 1877, s. 20.

(*l*) *Woodyer v. Hadden*, 5 Taunt. 125; *Barracrough v. Johnson*, 8 A. & E. 99.

(*m*) *Ib.*

Chap. VI.
Sect. 7.

though there may have been originally an intention to dedicate, if the intention to dedicate has been abandoned or something has been done to show that the original intention has been abandoned (*n*). An individual cannot without legislative authority dedicate a road to the public, if he reserves the right to charge tolls for the user (*o*).

If an intention to dedicate can be clearly shown, no particular time is necessary to render the dedication valid. It may be immediate, or as soon as some act is done on the part of the public, or persons claiming an interest in such dedication, denoting their intention of accepting the gift (*p*). A mere dedication by the owner of the soil will not of itself create a highway. There must also be an acceptance by the public. Dedication by the owner, and user by the public, must concur to create a road otherwise than by statute (*q*).

Where there is a public right of footway across land, and there is some surface land lying along the course of the public footpath, devoted to traffic, even if it be private traffic, then *primâ facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even though it be private traffic (*r*).

User evidence of
intention to
dedicate.

Enjoyment and user of a way by the public is evidence from which an intention to dedicate may be presumed (*s*). Where the character of the user has left no doubt as to the intention to dedicate by the owner of the land over which the way ran and the assertion of the right on the part of the public, a user of not many years continuance may be sufficient to establish the right (*t*). The idea of dedication may be rebutted by evidence of acts showing that the owner of the soil

(*n*) *Hall v. Corporation of Bootle*, (1876) 242, W. N. (1877) 221.
29 W. R. 863.

(*o*) *Austerberry v. Corporation of Oldham*, 29 C. D. 750. (*r*) *Per Buckley, J.*, in *Att.-Gen. v. Esher, &c., Co.*, (1901) 2 Ch. 647.

(*p*) *Poole v. Huskisson*, 11 M. & W. 826; *North London Railway Co. v. Vestry of St. Mary*, 21 W. R. 226. (*s*) *Poole v. Huskisson*, 11 M. & W. 826; *Turner v. Walsh*, 6 App. Ca. 642; *Mann v. Brodie*, 10 App. Ca. 386; *Marquis of Stafford v. Coyney*, 7 B. & C. 260.

(*q*) *Cubitt v. Maxse*, L. R. 8 C. P. 715; *Mackett v. Herne Bay Commissioners*, 37 L. T. 873, W. N. (*t*) *Att.-Gen. v. Biphosphated Guano Co.*, 11 C. D. p. 341.

contemplated only a licence revocable in a particular event (*u*). The erection of a post or gate at the entrance of the way, or other similar acts, will negative the intention to dedicate (*x*). A single act of interruption by the owner of the fee is of much more weight upon the question than many acts of enjoyment on the part of the public (*y*). In a case where a highway over a common had, without the authority or interference of the owner of the soil, been diverted by an adjoining proprietor, who substituted for it a new road, which was used by the public for more than twenty years, it was held that there was no dedication of the substituted road, but that the use of it was referable to the right of the public to deviate on to the adjoining land, whenever the owner of the soil stops a highway or suffers it to be foundrous (*z*).

Enjoyment and user of a way by the public is evidence from which the assent of the owner, whoever he is, may be inferred. It is sufficient if there might be a person who was competent to make the dedication. It lies upon the party denying the inference from the user to show that there was no person who had the power of dedicating it at the time the dedication is proved to have taken place (*a*). From evidence of acts of user of a footway by the public, extending over the whole time of living memory, during which, however, the way passed had been under lease, it was held that the jury might presume against the reversioner a dedication of the way by his ancestors to the public at a period of time anterior to the land having first been leased (*b*). So also where there has been long user

User evidence of
intention to
dedicate.

(*u*) *Barraclough v. Johnson*, 8 A. & E. 99, 104.

(*x*) *Roberts v. Carr*, 1 Camp. 262 n.; *Rugby Charity v. Merryweather*, 11 East, 376 n.; *Mildred v. Weaver*, 3 F. & F. 30; *Vestry of Bermondsey v. Brown*, 1 Eq. 204.

(*y*) *Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Poole v. Huskisson*, 11 M. & W. 826; *Healey v. Corporation of Butley*, 19 Eq. 388.

(*z*) *Dawes v. Hawkins*, 8 C. B. N. S. 848.

(*a*) *Reg. v. Eastmark*, 11 Q. B. 877; *Reg. v. Petrie*, 4 E. & B. 738; *Turner v. Walsh*, 6 App. Ca. 636. See *Vernon v. Vestry of St. James*, 16 C. D. 457.

(*b*) *Winterbottom v. Earl of Derby*, L. R. 2 Exch. 316; cf. *Haigh v. West*, (1893) 2 Q. B. 19 (C. A.). But a lost grant cannot be presumed where such a grant would be in contravention of a statute, *Neaverson v. Peterborough Rural Council*, (1902) 1 Ch. 557 (C. A.).

Chap. VI.
Sect. 7.

by the public of a footpath across copyhold land, dedication of the path to the public by the lord as well as by the copyholder will be presumed, unless there is evidence to rebut the presumption (c). It is an unsettled question what length of enjoyment of a way is requisite to raise the presumption of dedication (d). The amount of user and enjoyment by the public which is required in order to prove dedication varies according to the nature of the district in which the way is situated; e.g., in a thinly populated and mountainous district slight evidence of user might be sufficient (e).

There may be dedication for special uses or a limited purpose,

There may be a dedication of land for special uses or for a limited purpose, as for a footway, a horse way, or a drift way (f). A dedication may be made subject to the reservation of a private right to some extent interfering with the public one (g). There may in law be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up, in due course of husbandry, and destroy all trace of it for a time (h). But there cannot be a valid dedication to a limited class of persons or part of the public, as to a parish. If there be a dedication at all, it must be in favour of the public (i). Nor can there be a dedication to the public for a limited time, certain or uncertain. If there be a dedication at all, it must be perpetual (k).

but not to a limited class of persons,

or for a limited time.

Dedication must be taken to be accepted by the public, subject to inconvenience arising from existing state of things.

A dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. If there be an erection or excavation existing in the way at the time of the dedication,

(c) *Powers v. Bathurst*, 28 W. R. 390.

(d) See *Rugby Charity v. Merryweather*, 11 E. 375 n.; *Jarvis v. Dean*, 3 Bing. 447; *Woodyer v. Hadden*, 5 Taunt. 125.

(e) *Macpherson v. Scottish Rights of Way Society*, 13 A. C. 744.

(f) *Poole v. Huskisson*, 11 M. & W. 830, per Lord Wensleydale.

(g) *Morant v. Chamberlin*, 6 H. & N. 541.

(h) *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Baker*, ib. 6 Q. B. 435; *Rundle v. Hearle*, (1898) 2 Q. B. p. 89.

(i) *Poole v. Huskisson*, 11 M. & W. 830; *Vestry of Bermondsey v. Brown*, 1 Eq. 204. See *Hildreth v. Adamson*, 8 C. B. N. S. 587, as to dedication of water in a public fountain.

(k) *Daves v. Hawkins*, 8 C. B. N. S. 848.

the owner of the soil is not liable for accidents thereby occasioned. The public must be taken to accept the way, subject to the inconvenience or risk arising from the existing state of things (l).

Chap. VI.
Sect. 7.

There is nothing inconsistent with the purposes of a sea or river wall, or embankment erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment, as in any other case of uninterrupted and open user by the public (m).

Dedication of
way along an
embankment.

A public road or highway is not an easement properly so called (n). The soil of a highway up to the centre of the road is presumed in law, in the absence of other evidence of ownership, to belong to the owners of the land on each side, subject to the right of passage of the public (o). A conveyance of land, bounded by a highway, is always presumed in law to carry the fee up to the centre of the road, as part and parcel of the grant; unless there be enough in the circumstances or enough in the expressions of the instrument to show a contrary intention (p). This presumption applies to streets in a town as well as to highways in the country (q). It seems that if A. owns houses on one side of a street and B. owns houses on the other side, but it turns out that the soil of the highway is not evenly divided between them, A. owning a little more or a little less than half the highway, then when A. conveys his houses describing them as bounded by the

Highway not an
easement.

Ownership of soil
of highway

(l) *Fisher v. Prowse*, 2 B. & S. Div. 270 (C. A.)

780; *Robbins v. Jones*, 15 C. B. N. S. 221; *Rundle v. Hearle*, (1898) 2 Q. B. 83.

(m) *Greenwich Board of Works v. Maudsley*, L. R. 5 Q. B. 397.

(n) *Rangely v. Midland Railway Co.*, 3 Ch. 310.

(o) *Smith v. Howden*, 14 C. B. N. S. 398; *Beckett v. Corporation of Leeds*, 7 Ch. 421; *Mayor, &c., of Tunbridge Wells v. Baird*, (1896) A. C. 434; cf. *Leigh v. Jack*, 5 Ex.

(p) *Berridge v. Ward*, 10 C. B. N. S. 400; *Micklethwaite v. Newlay Bridge Co.*, 33 C. D. 145. As to what is sufficient to rebut the presumption, see *Pryor v. Petre*, (1894) 2 Ch. 11 (C. A.); *Mappin v. Liberty & Co.*, W. N. (1902) 209.

(q) *In re White's Charities*, (1898) 1 Ch. 659; and see *London and North Western Railway Co. v. Westminster Corporation*, (1902) 1 Ch. 269.

Chap. VI.
Sect. 7.

highway, that portion of the highway which is vested in A. will by presumption of law, in the absence of circumstances showing a contrary intention, pass to the purchaser (r).

Strips of waste land between old inclosures and the highway belong *primâ facie* to the owners of the adjoining inclosures, unless there be something in the circumstances of the case to rebut the presumption (s).

Being owners of the soil of a highway, the adjacent proprietors have a right to all ordinary remedies for the freehold, and may maintain actions against any person who digs up the soil or cuts down trees growing on the side of the road, or left there for shade or ornament (t). The freehold and all the profits of the soil belong to them. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the right of passage in favour of the public and the provisions of the Highway Acts and police regulations (u). If trees growing by the side of the road are an obstruction to the road, the Highway Authority may order them to be cut (x).

Foundrous
highway.

If a highway be foundrous and impassable, a right to go over the adjoining land may exist, where the public have from time immemorial been accustomed to deviate; but where there is a limited dedication of a way, the public have no right to deviate, if the way is out of repair (y).

Right of access
to highway.

The right of the owner of property at the side of a highway to have access thereto is a totally different right from the public right of passing and repassing along the highway (z).

(r) (1898) 1 Ch. p. 666, *per* County Council, 45 C. D. 504.
Romer, J.

(s) *Doe v. Pearsey*, 7 B. & C. 304; *Laide v. Shepherd*, Str. 1004; *Good-*
Grose v. West, 7 Taunt. 39; *Doe v.* *title v. Alker*, 1 Burr. 133; *Cunliffe*
Hampson, 4 C. B. 267; *Simpson v.* *v. Whalley*, 13 Beav. 416; *Harrison*
Dendy, 8 C. B. N. S. 433; *Curtis v.* *v. Duke of Rutland*, (1893) 1 Q. B.
Kesteven County Council, 45 C. D. p. 155.

504. See *Countess of Belmore v. Kent* *(r)* *Turner v. Ringwood Highway*
County Council, (1901) 1 Ch. 873. *Board*, 9 Eq. 418; *Unwin v. Hanson*,

(t) *Frompton v. Tiffin*, 2 Jur. (1891) 2 Q. B. 115 (C. A.).

986; *Goodson v. Richardson*, 9 Ch. (y) *Arnold v. Holbrook*, L. R. 8

221; *Edwards v. Jolliffe*, W. N. Q. B. 100.

(1877) 120; *Curtis v. Kesteven* (z) *Ante*, p. 225.

A towing path is a highway to be used only for horses employed in towing vessels (a). The owner of the land opposite the towing path is owner of the land over which the towing path passes, unless there is evidence to show that the trustees or conservators of the navigation have acquired a right to the soil. He has every right over that land which is his own other than a right to impede the navigation. The duty of the trustees is to keep the towing path in a fit state for the public use as a towing path, and in a proper case they may have an injunction to restrain the owner of the soil from so using it as to interfere with its use by the public for the purposes of the navigation (b).

Chap. VI.
Sect. 7.

Towing path.

The right of navigation in inland waters or in rivers above tidewater is simply a right of way. The public who have acquired by user a right of navigation on inland waters have no right of property. They have a right to pass as freely and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shown that what is done will necessarily produce effects which will interfere with that right, there is no *injuria* of which they can complain. But when the right of navigation exists a proprietor has no right to execute any works which will interfere or obstruct the navigation or the free use of the towing path along the river for the purpose of navigation (c).

Right of
navigation.

The right of the public to navigate a stream may be created either by prescription, or by dedication of the owner of the soil within time of legal memory (d).

The withdrawal of a part of a highway from its ordinary use is a nuisance to a highway. It is no answer that the public will be benefited thereby (e). A county council cannot legally sanction the erection of a permanent structure not authorised

Nuisance to
highway.

(a) *Winch v. Conservators of Thames*, L. R. 7 C. P. 471.

(d) *Caldwell v. Maclaren*, 9 App. Ca. 405.

(b) *Lee Conservancy Board v. Buton*, 12 C. D. 383, 6 App. Ca. 685.

(e) *Reg. v. Train*, 2 B. & S. 640. See *Queen v. Longton Gas Co.*, 2 El. & El. 660; *Corporation of Preston v. Fullwood Local Board*, W. N. (1885)

(c) *Orr Ewing v. Colquhoun*, 2 App. Ca. 846; and see *Smith v. Andrews*, (1891) 2 Ch. 678, 697.

213, 34 W. R. 196.

Chap. VI.
Sect. 7.

Right to abate
nuisance.

by the necessities of the public service upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction (*f*). The right of the public to use a highway extends to the whole road and not merely to the part used as *via trita*. The owner of the land has no right to create an obstruction so as to prevent the public from passing over the side of the highway (*g*). If a part of the highway be inclosed by a private individual, the highway authority may remove the obstruction (*h*). Any member of the public may abate an obstruction to the highway from which he suffers special damage (*i*). But it seems that such right of abatement does not exist where the nuisance is one arising from mere non-feasance; *e.g.*, where a bridge has been allowed to fall out of repair (*k*).

Right of access
to highway.

An Urban District Council has power to remove an encroachment upon any highway vested in it by sect. 149 of the Public Health Act, 1875, without first taking proceedings summarily or by indictment against the person alleged to have encroached (*l*).

The right of a landowner to use a public highway for the purpose of bringing materials for the building or repairing a house on the land must be exercised reasonably. The public must submit to the inconveniences occasioned necessarily in repairing a house. The question in all cases is whether or not the obstruction of the street is greater than was reasonable in point of time and manner, taking into consideration the interests of all parties and without unnecessary inconvenience. If there are several ways of access to land, there is no absolute right to use the land in the most convenient way exclusively

(*f*) *Att.-Gen. v. Mayo County Council*, (1902) 1 Ir. R. 13. (1896) 1 Q. B. 604.

(*g*) *Nicoll v. Beaumont*, 53 L. J. Ch. 854; and see *Att.-Gen. v. Brighton Supply Association*, (1900) 1 Ch. 276 (C. A.); *Barber v. Penley*, (1893) 2 Ch. 447.

(*h*) *Bagshaw v. Brixton Local Board*, 1 C. D. 220; *Reynolds v. Urban District Council of Presteign*,

(*i*) *Campbell Davys v. Lloyd*, (1901) 2 Ch. 523.

(*k*) *Campbell Davys v. Lloyd*, (1901) 2 Ch. 518, 523, 527 (C. A.).

(*l*) *Reynolds v. Urban District Council of Presteign*, (1896) 1 Q. B. 604; *Murray v. Epsom Local Board*, (1897) 1 Ch. 35.

without regard to the convenience of neighbouring land-owners (*m*). In a case of doubt or difficulty the right of the occupier of premises abutting on a highway to make a reasonable use of it for the purpose of loading or unloading goods at his premises, must yield to the public right of unobstructed passage along the highway. It is in each case a question of degree whether the exercise of this private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable, and in determining this question regard must be had to all the facts of the case (*n*). In a case in which traders carrying on a large business in Brighton, at premises situate in a street the roadway of which was less than 20 feet wide, kept as many as six vans at once during every alternate hour in the daytime loading and unloading goods at their premises, it was held that this was an unreasonable use of the highway, amounting to a public nuisance, the continuance of which must be restrained by injunction (*n*).

The driving of cattle along a highway is an ordinary use of the highway, and is not actionable. Persons living in houses looking upon a highway, must accept the advantage of having the highway there in return for the inconvenience which may attend upon its existence (*o*).

No length of time can legalise a public nuisance (*p*).

SECTION VIII.—NUISANCES TO FERRIES.

ANOTHER class of cases in which the interference of the Court by injunction is sought are nuisances to a ferry (*q*). A ferry is a highway for all the King's subjects paying the toll (*r*). It is a franchise which none can set up without a licence from

(*m*) *Fritz v. Hobson*, 14 C. D. 542.

(*n*) *Att.-Gen. v. Brighton, &c., Supply Association*, (1900) 1 Ch. 278 (C. A.)

(*o*) *Truman v. London, Brighton, &c., Railway Co.*, 25 C. D. 428.

(*p*) *Mott v. Shoolbred*, 20 Eq. 24.

(*q*) *Cory v. Yarmouth and Norwich Railway Co.*, 3 Ha. 593; *Hemphill v. M'Kenna*, 3 Dr. & War. 183; *Letton v. Goodden*, 2 Eq. 123.

(*r*) *North and South Shields Ferry Co. v. Barker*, 2 Exch. 149.

Chap. VI.
Sect. 8.

the Crown, and in the case of a ferry by prescription, a grant or licence is presumed (s). A ferry is the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on one side to its re-commencement on the other side (t). A ferry is wholly unconnected with the ownership or occupation of land. It is not necessary that the owner of the ferry should have a property in the soil on either side. He must have a right to land upon both sides, but he need not have the property of the soil on either side. It is sufficient if the landing-place be a public highway (u). A ferry exists only in respect of persons using the right of way. The right of the grantee of a ferry is the exclusive right of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side (x). The owner of a ferry is under the obligation of always providing proper boats with competent boatmen and all other things necessary for the maintenance of the ferry in an efficient condition for the use of the public (y).

If a new ferry is erected on a river, without the King's licence, so near an ancient ferry as to draw away its custom, it is a nuisance to the owner of the ancient ferry (z). The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of passengers using the way, and if the alleged wrongdoer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no difference to travellers, he would indirectly carry in the line of the owner of the ferry (a).

Nuisances to
ferries.

But in considering whether the owner of an ancient ferry has

- | | |
|---|--|
| (s) <i>Huzzey v. Field</i> , 2 Cr. M. & R. 440; <i>Letton v. Goodden</i> , 2 Eq. 123. | N. S. 58, 13 C. B. N. S. 864. |
| (t) <i>Ib.</i> ; <i>Newton v. Cubitt</i> , 12 C. B. N. S. 58, 13 C. B. N. S. 864. | (y) <i>Letton v. Goodden</i> , 2 Eq. p. 131; <i>Att.-Gen. v. Simpson</i> , (1901) 2 Ch. 671, 692, 718. |
| (u) <i>Ib.</i> ; <i>Peter v. Kendal</i> , 6 B. & C. 710; <i>Att.-Gen. v. Simpson</i> , (1901) 2 Ch. p. 718. | (z) <i>Ib.</i> ; <i>Leamy v. Waterford and Limerick Railway Co.</i> , 7 Ir. C. L. 27. |
| (x) <i>Huzzey v. Field</i> , 2 Cr. M. & R. 440; <i>Newton v. Cubitt</i> , 12 C. B. | (a) <i>Newton v. Cubitt</i> , 12 C. B. N. S. 58. |

a ground of action against a person who sets up a new ferry in the neighbourhood of the ancient ferry, the interests of the public will be regarded. The area of the monopoly of a ferry will depend on the need of the public for passage. A limit which would be suited to the simple wants of a rude life, where inhabitants are few, is unfitted for large towns where daily wants are greatly multiplied. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity is not actionable (*b*). The owner of a ferry cannot maintain an action for loss of traffic against a person opening a new highway to meet a public road, though such new highway crosses the water near the ancient ferry, and diverts from it a part of the traffic (*c*). It is, indeed, very questionable whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat (*d*).

A ferry being a franchise and therefore an hereditament is land within the meaning of the Lands Clauses Act. In *Queen v. Cambrian Railway Co.* (*e*), the owner of a ferry was held entitled to compensation for disturbance of his franchise from a railway company for building a bridge, which not only carried the railway but was also a foot bridge, though the making of the bridge was authorised by statute. But if the bridge be merely a bridge for carrying the railway, the owner of the ferry cannot bring an action for disturbance of custom, unless he can establish loss of custom in fact by making use of the railway (*f*).

SECTION IX.—NUISANCES TO MARKET.

ANOTHER class of cases in which the interference of the Court by injunction has been sought are nuisances to rights of market (*g*).

- (*b*) *Newton v. Cubitt*, 12 C. B. N. S. 58, 13 C. B. N. S. 864;
Dixon v. Curwen, W. N. (1877) 4.
(*c*) *Hopkins v. Great Northern Railway Co.*, 2 Q. B. D. 224.
(*d*) *Ib.*

- (*e*) L. R. 6 Q. B. 422.
(*f*) *Jones v. Stunstead, &c., Railway Co.*, *ib.* 4 P. C. 118.
(*g*) *Great Eastern Railway Co. v. Goldsmid*, 9 App. Ca. 927; *Horner v. Whitechapel Board of Works*, 55

Chap. VI.
Sect. 9.

The right to a market is a franchise and may exist by charter, by prescription, or by Act of Parliament (*h*).

Right of market. It is not essential to make a right of market good that it should be granted to a person who had actually got the freehold or ever had an interest in the land. The grant of a right of market is a franchise which gives to the person to whom it is granted the right to exercise it if he can. If the owner of the land over which a right of market has been granted, leases his land to the grantee of the right of market for the purpose of holding the market, the franchise may be exercised, so long as that state of things continues (*i*).

If the Lord of a Manor proves a market immemorially held in certain places within the manor, it is not a necessary inference that the market was granted to be holden in those places only, but a jury may presume that the market was granted to be holden in any convenient place within the manor (*k*).

The grant of a right of market gives the grantee the right, if he has done nothing to forfeit it, to hinder other persons from meddling with the franchise. He is entitled to hold the market during market hours, and cannot be interfered with even though an obstruction of the streets which, but for such grant, would amount to a nuisance, be thereby caused (*l*).

The grant of a market does not of itself confer the right to prevent persons from selling on market days in their own shops, though within the town or manor where the market may be held (*m*); but the right may be acquired by immemorial enjoyment or prescription (*n*).

The right to take tolls from the customers is usually but not necessarily a part of the privilege (*o*); and the tolls are due

L. J. Ch. 289; *Att.-Gen. v. Horner*, 11 App. Ca. 70; *Abergavenny Improvement Commissioners v. Straker*, 42 C. D. 83.

(*h*) *De Rutzen v. Lloyd*, 5 A. & E. 456.

(*i*) *Att.-Gen. v. Horner*, 11 A. C. 80.

(*k*) *De Rutzen v. Lloyd*, 5 A. & E. 456.

(*l*) *Att.-Gen. v. Horner*, 11 A. C. 80.

(*m*) *Mayor, &c., of Macclesfield v.*

Chapman, 12 M. & W. 18.

(*n*) *Mosley v. Walker*, 7 B. & C. 40; *Mayor, &c., of Penrhyn v. Best*, 3 Exch. D. 292, 300 (C. A.); and see *Abergavenny Improvement Commissioners v. Straker*, 42 C. D. 83.

(*o*) *Heddy v. Wheelhouse*, Cro. Eliz. 558, 592; *Rex v. Starkey*, 7 A. & E. 106; and see *Newcastle (Duke of) v. Workson Urban Council*, (1902) 2 Ch. 156, 157.

either in respect of goods sold there or for stallage or pickage or the like in respect of stalls or poles fixed in the soil (*p*). It is however essential that the tolls imposed be reasonable in amount; if the tolls exacted are unreasonable, the franchise is illegal and void (*q*).

A man who has the franchise can maintain an action against any one who sets up a rival market so as to injure him, though it is not on the same day, provided it is within such a distance as to injure him (*r*). The fact that there may be a statutory remedy does not exclude the remedy by injunction unless the statute expressly or by necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right (*s*). Disturbance of market.

Persons alleging statutory rights in a market, and claiming an injunction and account, may bring a representative action if the relief sought is beneficial to all whom the plaintiffs represent. The rule is not limited to persons having a beneficial proprietary interest, nor need the nominal plaintiffs have been wronged in their individual capacity. The Attorney-General is not a necessary party to such an action (*t*).

It is not necessary to constitute disturbance of market that the defendant should claim to have a rival exclusive right of market. There is a disturbance of market where a man sets up a rival place of sale in such a way as to injure and deprive the plaintiff of the benefit of the franchise (*u*). The sale however by a man in his own shop in the regular and ordinary course of business of goods similar in their nature to those sold in the market is not a disturbance of market (*x*). But a man may not under the right to sell marketable articles in

- | | |
|--|--|
| (<i>p</i>) 2 Inst. 219. | <i>Recreation Ground Co., W. N.</i> (1902) |
| (<i>q</i>) <i>Heddy v. Wheelhouse</i> , Cro. Eliz. 558, 592. | 208. |
| (<i>r</i>) <i>Yard v. Ford</i> , 2 Saund. 500 ; | (<i>t</i>) <i>Bedford (Duke) v. Ellis</i> , (1901) |
| <i>Moseley v. Chadwick</i> , 7 B. & C. 47 n. ; | A. C. 1. |
| <i>Great Eastern Railway v. Goldsmid</i> , | (<i>u</i>) <i>Prince v. Lewis</i> , 5 B. & C. |
| 9 App. Ca. 957, per Lord Blackburn. | 363 ; <i>Great Eastern Railway v.</i> |
| (<i>s</i>) <i>Stevens v. Chown</i> , (1901) 1 | <i>Goldsmid</i> , 9 App. Ca. 927. |
| Ch. 894. See <i>Att.-Gen. v. Ashborne</i> | (<i>x</i>) <i>Mayor, &c., of Manchester v.</i> |
| | <i>Lyons</i> , 22 C. D. 307. |

Chap. VI.
Sect. 9.

his own shop act in such a way as to set up a market in rivalry to the legal one. In order to determine this question all the elements in the case must be taken into consideration, although not one of them might be conclusive upon it (*y*). A man for example who erects a pen for cattle where he collects them and sells them by auction cannot say that he is selling in his own shop (*z*). A sale indeed by auction is not what people generally understand by selling in a shop (*a*).

There is a disturbance of market by intendment of law if a rival market is held on the same day; if the rival market is held on a different day, it is only evidence of disturbance for a jury (*b*).

To support an action for disturbance of market, it is not necessary that the defendant should have actually sold: any active interference by him in the conduct of the new market or participation in its profits or risk is sufficient (*c*).

Failure on the part of the lord of the market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale. Nor is the fact that the market may be so occupied and so used that if more people than actually came to it wished to do so, they would find difficulty in getting in, an excuse for disturbance of the market (*d*). Nor is the fact that the lord of the market did not maintain the market in good and sufficient order a bar to an action for disturbance of market; but if it be the fact that it did prevent a person from using the market, that may disprove the allegation that he had disturbed the market by selling as he did, inasmuch as he could not have sold in the market but was prevented from doing so (*e*).

(*y*) *Pope v. Whalley*, 6 B. & S. 311.

(*z*) *Fearon v. Mitchell*, L. R. 7 Q. B. 690; *Elwes v. Payne*, 12 C. D. 476.

(*a*) *Fearon v. Mitchell*, L. R. 7 Q. B. 690.

(*b*) *Mayor, &c., of Dorchester v. Ensor*, L. R. 4 Ex. 335.

(*c*) *Mayor, &c., of Dorchester v. Ensor*, L. R. 4 Ex. 335.

(*d*) *Great Eastern Railway Co. v. Goldsmid*, 9 App. Ca. 943.

(*e*) *Ib.* 961.

SECTION X.—NUISANCES CONNECTED WITH TRADE DISPUTES.

It seems that at common law a conspiracy or combination to raise wages was an indictable offence (*f*); and various statutes were passed prior to 1824 expressly prohibiting combinations or conspiracies on the part of workmen to raise wages or shorten the hours of labour (*g*). The old law of conspiracy.

By an Act passed in 1824 the combination laws were repealed; but in the following year this Act was itself repealed and the common law of conspiracy was restored (with certain exceptions in favour of meetings to discuss the rate of wages), and penalties were imposed for intimidation and molestation (*h*).

The Trade Union Act, 1871 (*i*), provides that the purposes of any trade union shall not, *by reason merely that they are in restraint of trade*, be deemed unlawful so as to render any member liable to prosecution for conspiracy, or so as to render void any agreement or trust. Trade Union Act, 1871.

The Act provides for the registration of trade unions, and enables any trade union to hold a limited amount of land and to deal with the same, and vests all the real and personal estate of a trade union in its trustees. The Act enables the trustees of a trade union, if authorised by its rules, to bring or defend proceedings concerning the property of the trade union.

The Conspiracy and Protection of Property Act, 1875 (*k*), provides that an agreement or combination by two or more persons to do, or procure to be done, any act in furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act, if committed by one person, would not be punishable as a crime (*l*). Conspiracy and Protection of Property Act, 1875.

This Act provides (*m*), however, that every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do

(*f*) Macdonell on Master and Servant, 597. vol. 12, p. 236.

(*i*) 34 & 35 Vict. c. 31.

(*g*) Macdonell, 596; Ency. of Laws of England, vol. 12, p. 236. (*k*) 38 & 39 Vict. c. 86.

(*l*) Section 3.

(*h*) Ency. of Laws of England, (*m*) Section 7.

Chap. VI.
Sect. 10.
Intimidation
and picketing.

or abstain from doing, wrongfully uses violence or intimidates such other person or his wife or children, or injures his property, or watches or besets the house or other place where such other person resides or works or carries on business or happens to be, or the approach to such house or place, shall be liable to a penalty or imprisonment. But attending at or near the house or other place where another person resides or works or carries on business or happens to be, in order merely to obtain or communicate information, is not to be deemed a "watching" or "besetting" within the section.

The above statutes clearly recognise the legality of strikes and lock-outs up to a certain point; but it is still illegal to use force or threats of violence to prevent others from working on such terms as they think proper (*n*).

Picketing.

Picketing is an annoyance, and if damage results is an actionable nuisance at common law (*o*); but where strictly confined to obtaining or communicating information, it is protected by the proviso in sect. 7 of the Act of 1875. The picketing of the works or place of business of an employer for the purpose of persuading people, whether masters or men, not to work for him, is a "watching or besetting" with a view wrongfully and illegally to compel persons to abstain from doing a lawful act within the meaning of sect. 7 of the Act of 1875, and is not within the proviso to that section (*p*).

To watch or beset a man's house with a view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act, because (1) it is an offence within sect. 7 of the Conspiracy and Protection of Property Act, 1875, and (2) because it is a nuisance at common law for which an action on the case would lie, for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset (*q*).

- | | |
|--|--|
| <p>(<i>n</i>) <i>Quinn v. Leatham</i>, (1901) A. C. 495, 541.
 (<i>o</i>) <i>Ib.</i>
 (<i>p</i>) <i>J. Lyons and Sons v. Wilkins</i>, (1896) 1 Ch. 811 (C. A.); <i>Walters</i></p> | <p><i>v. Green</i>, (1899) 2 Ch. 702, 703.
 (<i>q</i>) <i>J. Lyons and Sons v. Wilkins</i>, (1899) 1 Ch. 255 (C. A.), <i>per</i> Lindley, M.R., and Chitty, L.J.</p> |
|--|--|

Watching or besetting a place where a person "resides or works or carries on business or happens to be" within the Act (r) does not necessarily imply any lengthened watching, and is not limited to places habitually frequented by the workman thus picketed (s). In a recent case in which during the pendency of a strike two agents of a trade union attended at a landing stage to await the arrival of a steamer containing workmen imported by the masters from Ireland to replace the men on strike, and on the arrival of the steamer informed the Irish workmen of the strike and offered to pay their expenses if they would go elsewhere to work, it was held that the attendance at the landing stage was with a view to compel the masters to conduct their business in accordance with the requirements of the union and was not in order merely to communicate information, and an interlocutory injunction was granted against the officers of the union (t).

A trader has the right, in all matters not contrary to law, to regulate his own mode of carrying on his trade, and any invasion of this right is a legal wrong (u). The Trade Union Acts have not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful (x). It has been laid down that a combination of two or more persons without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, or not to continue in his employment, is, if it results in damage to such trader, actionable (y).

Interference
with a man in
the carrying on
of his trade.

The words "trade dispute between employers and workmen"

- (r) 38 & 39 Vict. c. 86. Bl. 74; *Allen v. Flood*, (1898) A. C. p. 92; *Quinn v. Leathem*, (1901) A. C. p. 526.
- (s) *Charnock v. Court*, (1899) 2 Ch. 35; *Walters v. Green*, (1899) 2 Ch. 696. (x) *Quinn v. Leathem*, (1901) A. C. p. 526.
- (t) *Charnock v. Court*, (1899) 2 Ch. 35; *Walters v. Green*, (1899) 2 Ch. 696, 703. But see *Glamorgan Coal Co. v. South Wales Miners' Federation*, 87 L. T. 232. (y) *Quinn v. Leathem*, (1901) A. C. 495; and see *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 88, 96, 732.
- (u) *Hilton v. Eckersley*, 6 El. &

Chap VI.
Sect. 11.

in sect. 3 of the Conspiracy and Protection of Property Act, 1875, do not include a dispute upon trade union matters between workmen who are members of a trade union and an employer of non-union workmen who refuses to employ the members of a trade union (z).

Defamatory
circulars.

The Court will restrain by injunction circulars and notices being sent out containing statements injurious to plaintiff's trade where the Court is satisfied that such statements are false (a).

In a recent case it was held that several members of an association of master builders might join as co-plaintiffs in an action against the officials of various trade unions, the right to relief arising out of the same series of transactions and there being a common question of law and fact (b).

A trade union
may be sued.

It has been decided by the House of Lords that a trade union registered under the Acts of 1871 and 1876 may be sued (like an incorporated company) in its registered name (c).

SECTION XI.—VARIOUS NUISANCES.

OTHER cases of nuisance which have been brought before the Court are nuisances to the sea-shore (d) ; to a private siding of a railway (e) ; to a right of stallage (f) ; to ground dedicated to public recreation (g) ; nuisances by the construction of a railway (h) ; damage to the crops of a market gardener (i) ; injury

(z) *Quinn v. Leathem*, (1901) A. C. 495.

3 D. & J. 673, 10 C. B. N. S. 287.

(a) *Collard v. Marshall*, (1892) 1 Ch. 571; *Trollope v. London Building Trades Federation*, W. N. (1895) pp. 29, 45; 72 L. T. 342. Cf. *Ajello v. Worsley*, (1898) 1 Ch. 274.

(f) *Ellis v. Corporation of Bridgnorth*, 2 J. & H. 67.

(b) *Walters v. Green*, (1899) 2 Ch. 696.

(g) *Att.-Gen. v. Mayor of Southampton*, 1 Giff. 363.

(c) *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, (1901) A. C. 426.

(h) *Great North of England Railway Co. v. Clarence Railway Co.*, 1 Coll. 507; *London and Birmingham Railway Co. v. Grand Junction Canal Co.*, 1 Ra. Ca. 224.

(d) *Corporation of Hastings v. Ivall*, 19 Eq. 558; *Llandudno Urban District Council v. Woods*, (1899) 2 Ch. 705.

(i) *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 436, 7 H. L. C. 600. The injury to trees or crops from smoke and vapours must be actual, substantial, and visible, such as would entitle the plaintiff to recover damages in an action. Contingent,

(e) *Bell v. Midland Railway Co.*,

to trees from brick-kilns (*k*) ; or iron works (*l*) ; injury to land from the smoke of copper works (*m*) ; injury to gas mains and pipes under a highway from steam rollers (*n*) ; tipping rock or rubbish on land (*o*) ; allowing one's land to become a nuisance by leaving the same vacant and unprotected, so that persons are able to deposit filth upon the same (*p*) ; a nuisance caused by a tramway company's clearing its lines of snow, heaping the same at the sides of the streets and scattering salt thereon (*q*).

A nuisance to a churchyard comes properly within the cognizance of the Ecclesiastical Courts (*r*).

In *Woodman v. Robinson* (*s*) a bill was filed by a single parishioner against some of the churchwardens of a parish to restrain them from warming the church in a manner which he alleged to be injurious to health. Lord Cranworth considered it doubtful whether it was a public nuisance, and whether such a bill could be sustained by a single parishioner ; but it was not necessary to decide the point (*t*).

prospective, or remote damage will not give a right to an injunction :

Salvin v. Brancepeth Coal Co., 9 Ch.

705. See *St. Helens Smelting Co.*

v. Tipping, 11 H. L. C. 650.

(*k*) *Beardmore v. Tredwell*, 3 Giff. 683.

(*l*) *Shott's Iron Co. v. Inglis*, 7 App. Ca. 528.

(*m*) *Tipping v. St. Helens Smelting Co.*, 1 Ch. 66.

(*n*) *Gas Light and Coke Co. v. Vestry of St. Mary Abbots*, 15 Q. B. D. 1.

(*o*) *Arnold v. Furness Railway Co.*, 22 W. R. 613.

(*p*) *Att.-Gen. v. Tod-Heatley*, (1897) 1 Ch. 560 (C. A.).

(*q*) *Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 111.

(*r*) *Large v. Alton*, Cro. Jac. 462 ; *Wenmouth v. Collins*, 2 Lord Raym. 850 ; *Wilson v. M'Muth*, 2 B. & Ald. 241, 3 Phill. 89 ; *Buxton v. Calcot*, *Cade v. Newenham*, 3 Phill. 91 ; *Earl Fitzwilliam v. Moore*, 3 Ir. Eq. 615.

(*s*) 2 Sim. N. S. 204.

(*t*) See as to acts in nature of waste in the churchyard, *ante*, pp. 64, 65.

CHAPTER VII.

INJUNCTIONS TO RESTRAIN THE INFRINGEMENT OF PATENTS.

SECTION I.—PRINCIPLES ON WHICH THE COURT RESTRAINS THE INFRINGEMENT OF PATENTS.

Chap. VII.
Sect. 1.

THE jurisdiction of the Court in restraining by interlocutory injunction the infringement of patent rights, is in aid of the legal right. The Court proceeds on the assumption that the person who makes the application has the legal right which he asserts, but needs the aid of the Court for the purpose of protecting his property from damage pending the trial of the legal right (*a*).

It seems to have been formerly the opinion that a Court of equity would not interfere by injunction to protect a patent right, until the right had been established at law. Gradually, however, the Court of Chancery abandoned this position (*b*), and since the Judicature Act the question has ceased to be one of practical importance.

But the reluctance of the Court of Chancery to interfere in cases of disputed patent right had its justification in reason as well as in the maxim of equity. We find accordingly that, while asserting its right to act independently of references to law, the Court of Chancery still continued to display its original caution in granting injunctions (*c*).

Under the Patents Act, 1883, ss. 13, 15, a patentee cannot take proceedings in respect of infringements committed before

(*a*) *Bacon v. Jones*, 4 M. & C. 436. *Cambridge v. Richardson*, 6 Ves. 689.

(*b*) *Universities of Oxford and* (*c*) See *post*, p. 263.

the publication of his complete specification and until letters patent have actually been granted to him; and if any proceedings shall be taken in respect of an infringement committed after a failure to make any payment within the prescribed time, the Court may refuse to award damages in respect of such infringement (*d*).

A patentee has frequently to consider how he ought to act when his patent is being infringed by several persons at the same time. A way out of the difficulties which such a case presents was suggested by Wood, V.-C., in *Bovill v. Crate* (*e*): "After getting information of case after case of infringement, the patentee might select that which he thought the best in order to try the question fairly, and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were *in simili casu* and say to them, Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you do not object on the ground of delay, I do not mean to file bills against all of you at once."

A plaintiff is entitled to apply for an injunction and to have his costs as soon as his legal right is invaded, although unintentionally; and he is under no obligation to give the defendant any notice before commencing an action (*f*), or to discontinue proceedings on the defendant admitting and promising not to repeat the infringement (*g*).

Where an account is claimed, all persons claiming any interest, legal or equitable, in the patent, ought to be made parties to the action, so that the infringing defendants may not be called upon to account twice. But where only an injunction and delivery up of infringing articles are claimed, one of several owners has a right to sue alone (*h*).

(*d*) Sect. 17, sub-s. 4 (*b*).

(*f*) *Post*, p. 272.

(*e*) 1 Eq. p. 391. This course was approved and the effect of it explained in *North British Rubber Co. v. Gormully Co.*, 12 R. P. C. p. 21.

(*g*) *Losh v. Hagar*, 1 W. P. C. 200.

(*h*) *Bergmann v. Macmillan*, 17 C. D. 423.

Chap. VII.
Sect. 1.

Where a patent has been mortgaged, the mortgagor may sue alone without joining his mortgagee as a party (*i*).

So also if an invention can be severed into distinct portions the owner of one part may sue for infringement of that part (*k*).

It seems that a mere licensee of a patent is not a person having an interest in the patent; he is only a person permitted to use the invention, and therefore he cannot sue for infringement, even where his licence is exclusive (*l*). But an exclusive licensee may maintain an action against his licensor where the latter acts in breach of the licence so given (*m*).

A mere agent for sale cannot bring the action; whether a person is a mere agent or not depends upon the facts (*n*).

A legal assignee of a patent may sue for its infringement (*o*), but before doing so he should be careful to complete his title by registration (*p*). So also may an equitable assignee (*q*). The action may also be brought by the assignee or trustee of a bankrupt (*r*).

Where a patent is granted to two persons jointly, and one dies, it seems that the patent passes by survivorship, and the survivor can alone sue (*s*).

Where a patent is vested in two persons as tenants in common, and one dies, actions for infringement committed before his death survive to the other, who is entitled at law to recover the whole damages (*t*).

Who may be
sued.

The actual infringer is the proper defendant. Thus where the infringement occurs in the course of work done under a contract, the contractor who carries out the work, and not the architect who indicates what is to be done, is the person who

(*i*) *Van Gelder v. Sowerby, &c.*, 44 C. D. 374. (*p*) *Chollet v. Hoffman*, 26 L. J. Q. B. 249.

(*k*) *Ib.*

(*q*) *Actien Gesellschaft v. Temler*, 16 R. P. C. 447.

(*l*) *Heup v. Hartley*, 42 C. D. 461; but see *Renard v. Levinstein*, 2 H. & M. 628, 631.

(*r*) *Blozum v. Elsee*, 6 B. & C. 169.

(*m*) *Guyot v. Thomson*, (1894) 3 Ch. 388.

(*s*) *National Co. v. Gibbs*, (1899) 2 Ch. 289; but see S. C. 16 T. L. R. 348.

(*n*) *Adams v. North British Railway Co.*, 29 L. T. 367.

(*t*) *Smith v. L. & N. W. Railway Co.*, 2 El. & Bl. 69.

(*o*) *Electric Telegraph Co. v. Brett*, 20 L. J. C. P. 123.

ought to be sued (*u*). Custom House agents who arrange for the storing and transshipment in an English port of an article which infringes an English patent do not thereby make themselves liable as infringers (*x*). But carriers who bring infringing articles into England are liable, and may be restrained by injunction (*y*). A person who merely prepares the materials from which the infringing article is made is not liable as an infringer (*z*).

The directors of a company may be liable for acts of infringement committed by workmen employed in their service, even where such workmen have acted in disobedience to express orders. Although the master in whose employment the infringement is committed is the proper defendant, his servants by whom he has committed the breach of patent right are equally liable and may be joined as defendants, and it is no answer to say that they only conformed to the orders of their employer (*a*).

Where an infringing manufacturer sells the patented article, both the manufacturer who makes, and the purchaser who uses the same are liable to the patentee, and may be joined as co-defendants in one action (*b*). But where a plaintiff company sued the makers of infringing articles, and on motion for an interlocutory injunction accepted an order under which the defendants paid certain sums into Court to represent royalties, and undertook to keep an account till the trial, it was held that no interlocutory injunction could be obtained against customers who had purchased the infringing articles from the defendants, to restrain them from using such articles (*c*).

Although foreign subjects committing acts of infringement in the United Kingdom are liable to be sued therefor (*d*), the

(*u*) *Denley v. Blore*, 38 London Journal, 224.

(*x*) *Nobel's Explosives Co. v. Jones*, 8 App. Ca. 5.

(*y*) *Washburn Manufacturing Co. v. Cunard Co.*, 6 R. P. C. 403.

(*z*) *Townsend v. Haworth*, 12 C. D. 831 n.; *Savage v. Brindle*, 13 R. P. C. 266.

(*a*) *Betts v. De Vitre*, 3 Ch. 429; *Adair v. Young*, 12 C. D. 18; and see *Sykes v. Howarth*, 12 C. D. 826.

(*b*) *Proctor v. Bennis*, 36 C. D. 740.

(*c*) *Pneumatic Tyre Co. v. Goodman*, 13 R. P. C. 723.

(*d*) *Caldwell v. Vanrliessengen*, 9 Ha. 415.

Chap. VII.
Sect. 1.

Court has refused to allow property of a foreign sovereign which was an infringement of an English patent to be detained in this country against the will of that sovereign (*e*).

The Court has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country.

A foreigner who manufactures abroad and sends by post at their request to a firm in England articles which infringe an English patent does not himself infringe the patent, and is not liable to an injunction restraining infringement in an action by the owner of the English patent (*f*).

Pleading.

The form of statement of claim in an action for infringement given in the Appendix to the Rules of the Supreme Court (*g*) contains the following material allegations, viz.: the number, term, date and subject-matter of the plaintiff's patent, the plaintiff's interest therein, the fact of infringement by the defendant, and a claim for injunction and damages. It is not necessary to allege the novelty of the invention, since the allegation of the grant and the production of the letters patent throw upon the defendant the onus of disputing the novelty (*h*). Nor is it necessary to allege that the patentee has duly paid the instalments of stamp duties required to keep the patent alive (*i*), nor is any reference to the specification needed (*k*). The form prescribed by the Rules does not contain any allegation as to the validity of the patent. The statement of claim must, however, state such a case as will justify the Court in granting the injunction asked for (*l*). The plaintiff must deliver with his statement of claim, or by order of the Court at any subsequent time, particulars of the breaches complained of, and at the hearing no evidence can, except by leave of the Court, be admitted in proof of any alleged infringement of which particulars are not so delivered (*m*). If the plaintiff is claiming costs as between

- | | |
|--|---|
| (<i>e</i>) <i>Vavasour v. Krupp</i> , 9 Ch. | 145. |
| 351. | (<i>k</i>) <i>Westhead v. Keene</i> , 1 Beav. |
| (<i>f</i>) <i>Batlische Anilin, &c. v. Basle</i> | 289. |
| <i>Chemical Works</i> , (1898) A. C. 200. | (<i>l</i>) <i>Curtis v. Cutts</i> , 8 L. J. Ch. |
| (<i>g</i>) App. C., Sect. VI., No. 6. | 184. |
| (<i>h</i>) <i>Amory v. Brown</i> , 8 Eq. p. 663. | (<i>m</i>) Patents Act, 1883, s. 29. |
| (<i>i</i>) <i>Sarazin v. Hamel</i> , 32 Beav. | |

solicitor and client, on the ground that the patent has already been tested by the Court and a certificate of validity granted, this should be pleaded (*n*).

Chap. VII.
Sect. 1.

A defendant in a patent action is at liberty to avail himself of two different kinds of defence: (1) he may deny that he has committed any infringement of the patent right; (2) he may deny that the plaintiff has any title to the privilege claimed—a defence based either on the ground that there is no such patent in existence as the plaintiff alleges, or that the patent is defective and void, and every defendant may avail himself of both or either of these different lines of defence (*o*). In the form of defence given in the Appendix to the Rules the following pleas are inserted: 1. The defendant did not infringe the patent. 2. The invention was not new. 3. The plaintiff was not the first and true inventor. 4. The invention was not useful. 5. Denial of any other fact affecting the validity of the patent. 6. The patent was not assigned to the plaintiff. A very common form of defence is still shorter, and yet is sufficient: 1. The defendant denies infringement. 2. The plaintiff's patent is invalid for the reason appearing in the particulars of objection (*p*). The defendant must deliver with his statement of defence, or by order at any subsequent time, particulars of any objections on which he relies in support thereof (*q*).

A man who applies for an injunction *ex parte* to restrain the infringement of a patent right must swear at the time of making the application that he believes that the invention was new, and had never been practised in the kingdom at the date of the patent. It is not enough that it was believed to be new at the time the patent was taken out; for, although when he obtained the patent he might have very honestly sworn as to his belief of such being the fact, circumstances may have subsequently occurred, or information may have been since that time communicated to him, sufficient to convince him that it was not his original invention, and that he was under a mistake

Evidence.

(*n*) *Pneumatic Tyre Co. v. Chisholm*, 13 R. P. C. 488.

(*p*) *Edmunds*, 338.

(*q*) *Patents Act*, 1883, s. 29.

(*o*) *Hindmarch*, 262.

Chap. VII.
Sect. 1.

— when he made the application for the patent (*r*). If the application is made by the patentee, he must distinctly swear that he is the first and true inventor, and must verify all the material allegations of the statement of claim. He must verify by affidavit the grant of the patent, its specification according to due form, its novelty and utility. If the application is made by an assignee of the patent, he must prove the assignment by the best evidence he can procure, and must also, if he can, procure an affidavit from the patentee (*s*). If the application be made after the validity of the patent has been established at law, the affidavits must show the nature of the proceedings at law and the result (*t*). The affidavits must also show that an actual infringement has taken place, and must state the particulars in which the infringement consists (*u*), and must show that there has been no delay in making the application after knowledge of the infringement has been obtained (*x*).

Where a plaintiff is entitled to several patents which between them cover every possible method of production of a particular article, he is entitled to damages for infringement against a person selling such article, on proof that one of the patents must have been infringed, without showing which (*y*).

The evidence of the defendant in opposition to the application for an injunction should prove the allegations in the statement of defence (*z*), and should show either that the plaintiff was not the first and true inventor, or that the invention was not new, or that the specification was insufficient, or that no infringement has taken place, or he may state any other circumstance that would show the patent to be void. If he deny the novelty of the invention or the validity of the patent, an injunction will not be granted or supported, unless

(*r*) *Hill v. Thompson*, 3 Mer. 624; H. 87; *Betts v. Willmott*, 6 Ch. 244.
Sturz v. De la Rue, 5 Russ. 329;

Gardner v. Broadbent, 2 Jur. N. S. 1041; *Mayer v. Spence*, 1 J. & H. 87; *Betts v. Willmott*, 6 Ch. 244. (*s*) *Losh v. Hague*, 1 Webs. 200.
See further as to evidence, *post*, p. 267.

(*t*) *Bickford v. Skewes*, 4 M. & C. 500. (*y*) *Saccharin Corporation v. Quincy*, (1900) 2 Ch. 246.

(*z*) *Ante*, p. 251.

(*u*) *Hill v. Thompson*, 3 Mer. 624.

(*u*) *Ib.*; *Mayer v. Spence*, 1 J. &

the plaintiff files a very clear and distinct affidavit as to the novelty of the invention or the validity of the patent. The motion may be allowed to stand over for that purpose (a).

The ordinary rules of discovery apply notwithstanding the statutory provisions for the delivery of particulars (b). The defendant must answer fully the inquiries which the plaintiff is entitled to make. He cannot, by denial of the plaintiff's title, escape answering (c). He is bound, though he may deny the fact of infringement, to answer fully whether he uses in his process the materials mentioned in the specification; whether he uses any additional materials; and whether such additions, if any, make any difference in the process. But he is not, it would appear, bound to disclose the proportions in which he uses the specified materials, or what the additional materials are (d). If the subject of the patent be a machine, the patentee is entitled to have full information as to every variety of combination of machine used by the defendant by which the patent is infringed (e). A defendant must, if interrogated, answer as to what infringements he has been guilty of, and he must disclose, if asked, the names and addresses of all persons, whether in England or abroad, from whom he has received money in respect of royalties or licences to use the articles made in infringement of the patent (f). He must also, if interrogated, answer touching the sales of certain goods and to certain customers, if he does not admit the sale of the goods inquired after (g). A defendant is not excused from answering fully on the ground that the validity of the patent has not been established (h). But a man who denies by his answer the fact of infringement is not bound to answer before judgment,

(a) *Whitton v. Jennings*, 1 Dr. & Sm. 111.

(b) *Birch v. Mather*, 22 C. D. 629; *Germ Milling Co. v. Robinson*, 1 R. P. C. 218; *Moseley v. Victoria Rubber Co.*, 3 ib. 356.

(c) *Swinborne v. Nelson*, 16 Beav. 416.

(d) *Renard v. Levinstein*, 3 N. B. 665, 10 L. T. 94.

(e) *Foxwell v. Webster*, 4 D. J. & S. 79.

(f) *Howe v. M'Kernan*, 30 Beav. 546; *Crossley v. Stewart*, 1 N. R. 426.

(g) *Lister v. Norton*, 2 Pat. Ca. Rep. 68; *Saccharin Corporation v. Chemicals Co.*, (1900) 2 Ch. 556.

(h) *Foxwell v. Webster*, 3 N. R. 103.

Chap. VII.
Sect. 1.

interrogatories which assume the fact of infringement, and are immaterial to that question (*i*).

The plaintiff is bound to answer all the interrogatories of the defendant which are fairly calculated to show that the patent is not a good patent, or that that which the plaintiff alleges to be an infringement is not an infringement (*l*).

Delay and
acquiescence.

A man who seeks the aid of the Court for the protection of his patent rights must show proper diligence in making the application. If he has openly encouraged or silently acquiesced in the invasion of his right, or has allowed another to expend monies or erect works upon the faith that no impediment will be placed in the way of his enjoyment, his equity to the extraordinary interference of the Court is gone (*m*). This doctrine is applicable not only to the case of the particular conduct of the patentee towards the person with whom the controversy subsists, but also to cases where his conduct with others may influence the Court in the exercise of its equitable jurisdiction (*n*). A man whose patent rights are invaded by several persons should give distinct notice to each to discontinue the infringement. If he proceeds against one only, without giving notice to the others, and allows a considerable period to elapse before taking steps to enforce his rights against them, he may lose his right to the protection of the Court (*o*).

What delay will be fatal to an application for an interlocutory injunction will be hereafter considered (*p*); but delay or acquiescence which would be fatal to an application for an interlocutory injunction may not debar a plaintiff from obtaining a perpetual injunction at the trial (*q*).

(*i*) *Delarue v. Dickenson*, 3 K. & J. 388; *Lea v. Saxby*, 32 L. T. N. S. 731.

(*l*) *Huffman v. Postill*, 4 Ch. 681.

(*m*) *Bridson v. Benecke*, 12 Beav. 1; *Bovill v. Crate*, 1 Eq. 388; *ante*, pp. 16—19.

(*n*) *Rundell v. Murray*, Jac. 311;

Saunders v. Smith, 3 M. & C. 711; *ante*, p. 17.

(*o*) *Smith v. London & South Western Railway Co.*, Kay, 417. As to the effect of delay and acquiescence, see further, *ante*, pp. 16—19.

(*p*) *Post*, p. 265.

(*q*) *Post*, p. 269.

SECTION II.—WHAT IS AN INFRINGEMENT.

THE form of letters patent now in use provides that, to the end that the patentee may have the sole use and benefit of the invention, no one shall during the patent term “either directly or indirectly make use of or put in practice the said invention or any part of the same, nor in anywise imitate the same, nor make or cause to be made any addition thereto or subtraction therefrom whereby to pretend themselves the inventors thereof,” without the licence of the patentee. Moreover the grant is to the patentee that he by himself, his agents and licensees, and no others, may “make, use, exercise and vend the said invention.”

A breach of the monopoly granted and of the prohibitory clause is an infringement of the patent for which an action will lie and an injunction may be obtained. The ways in which a patent may be infringed are pointed out by the prohibitory words of the grant. If the patent be valid, any act which trespasses upon the patentee's field of invention is an infringement.

The intention not to infringe a patent is immaterial if there has been an infringement. There may be an infringement ^{Intention immaterial.} though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself (*r*). On the other hand, mere intention cannot make any act done an infringement which without that intention would not be an infringement (*s*).

By the Patents Act, 1883, s. 27, it is provided that a patent ^{Crown.} shall have the like effect against the Crown as it has against a subject, but the officers of the Crown may use the invention for the services of the Crown on terms.

Any person manufacturing the patented articles without the sanction of the patentee is an infringer of the patent and liable ^{Infringement by manufacture.} as such, though he procures the invention to be made in England by some one else, or procures it to be manufactured

(*r*) *Proctor v. Bennis*, 36 C. D. p. 760. (*s*) *Newall v. Elliott*, 10 Jur. N. S. 954.

Chap. VII.
Sect. 2.

abroad, and afterwards imports it into the United Kingdom (t). But the making which is prohibited is a making for profit either direct or indirect, that is, a making calculated to interfere with the benefit which the patentee would otherwise derive from his invention (u).

By experiment.

It is therefore no infringement to make the patented article by way of *bonâ fide* experiment merely. If a man makes things with a view of improving upon an invention, or with a view of seeing whether an improvement can be made, that is not an infringement. If there be neither using nor vending of the invention for profit, the mere making for the purpose of experiment ought not to be considered within the meaning of the prohibition, and if it were, it is certainly not the subject for an injunction (x).

User.

Mere possession of a patented article is not necessarily user, but acquisition, and possession of such an article for trade purposes constitutes user whatever the nature of the article may be (y). Using or exercising the invention is an infringement, though the user may have been passive only and not active, and even though the user was merely during transit and England was not the final destination of the infringing article (z). At the same time Custom House agents who pass an infringing article through the Custom House are not liable to the patentee on the ground of user (a). An agent to be liable must be an agent in the using of the invention, and not merely a person who has something to do with the means by which the goods get from one place to another (b).

Infringement by user may be negated by showing that the user was by way of experiment only, but the Court will narrowly scrutinise such a defence to see that no profit was made (c). and where the experimental user is for the advantage of the

- | | |
|--|---|
| (t) <i>Gibson v. Campbell</i> , 1 W. P. C. 631; <i>Incandescent Gaslight Co. v. Brogden</i> , 16 R. P. C. 179. | <i>Taylor</i> , (1901) 1 Ch. 122. |
| (u) <i>United Telephone Co. v. Sharples</i> , 2 R. P. C. p. 31. | (z) <i>Betts v. Neilson</i> , 3 Ch. 436, 439; <i>British Motor Syndicate v. Taylor</i> , 17 R. P. C. 189. |
| (x) <i>Frearson v. Loe</i> , 9 C. D. pp. 66, 67. | (a) <i>Nobel's Explosives v. Jones</i> , 8 App. Ca. 5. |
| (y) <i>British Motor Syndicate v.</i> | (b) <i>Ib.</i> , 17 C. D. 742, 743. |
| | (c) <i>Frearson v. Loe</i> , 9 C. D. p. 67. |

person using the machine, even when pecuniary profit does not directly result, such user is an infringement. The use therefore of the invention for the purpose of instructing pupils in a business (*d*), or for the more economical management of a business (*e*), is an infringement. Further, the quantity made may be too considerable to be consistent with mere experiment (*f*).

The user of English patents by foreign vessels in British waters is regulated by the Patents Act, 1888, s. 48.

To establish infringement by user, however, it must be shown that the infringer is using the invention for the same purpose as that claimed by the patentee. There is no infringement if the object of the patent is to produce one result and the object of the defendant is to produce another and quite different result (*g*).

The patent grant confers an *exclusive* right to vend the patented article. Therefore the mere seller who has not himself made the article, and who may even be ignorant of the fact that it is an infringement of a patent at all, is liable as an infringer (*h*); and the sale of an article in the making of which a patented product is an essential ingredient is an infringement (*i*). The sole right granted by the Crown includes a monopoly of the sale in this country of products made according to the patented process, whether made in the realm or elsewhere (*k*). Thus, the sale in England of articles made in France according to an English patent is an infringement of that patent (*l*), and it is immaterial that it was not known to the defendant that the article sold was made according to the patented process (*m*). It is equally an infringement even

(*d*) *United Telephone Co. v. Sharples*, 29 C. D. 164. C. D. 232.

(*e*) *Higgs v. Goodwin*, 27 L. J. Q. B. 421; *Fletcher v. Glasgow Gas Commissioners*, 4 R. P. C. 389.

(*f*) *Muntz v. Foster*, 2 W. P. C. p. 101.

(*g*) *Fletcher v. Glasgow Gas Commissioners*, 4 R. P. C. 389.

(*h*) *Von Heyden v. Neustadt*, 14

(*i*) *Saccharin Corporation v. Anglo-Continental, &c.*, (1901) 1 Ch. 414; and see *British Motor Syndicate v. Taylor*, 17 R. P. C. 189.

(*k*) *Von Heyden v. Neustadt*, 14 C. D. 232, 233.

(*l*) *Elmslie v. Boursier*, 9 Eq. 217.

(*m*) L. R. 5 Ex. p. 47.

Chap. VII.
Sect. 2.

when such importation is immediately followed by exportation after re-sale to a foreign customer (*n*), and though the goods are never in fact landed in the United Kingdom if they are brought for transshipment into British waters (*o*). But a foreign manufacturer who sells and delivers an infringing article outside the United Kingdom cannot be made liable as an infringer here, even if he so acts with knowledge that such article is bought for importation into England (*p*).

A person who without licence offers for sale or exposes for sale a patented article is liable as an infringer even if no sale is effected, and so it would seem if the article is merely used as a sample (*q*). But the sale of materials, which may be used for making a patented article, to a person other than the patentee, even if the vendor knows they are to be used for such purpose in breach of the patentee's rights, is no infringement for which an action will lie (*r*). A sale of parts adapted for fitting together would, however, probably be held to be an infringement (*s*), and a person who contracts to put the ingredients together infringes the patent, even if he employs a sub-contractor to do part of the work (*t*). A vendor who invites his customers to use in an infringing manner the articles he sells is himself guilty of infringement (*u*).

Repairs.

It is no infringement of a patent to merely repair a patented article. But if the process of repairing is carried so far as to result in what is really a new article made according to the patented invention, the person executing such repairs will be liable as an infringer (*x*). So, too, if repairing a patented article necessarily involves the introduction anew of some component

(*n*) *United Telephone Co. v. Sharples*, 2 R. P. C. p. 31.

(*o*) *Nobel's Explosives v. Jones*, 17 C. D. 721.

(*p*) *Badische Anilin, &c. v. Johnson*, (1897) 2 Ch. 322; *Saccharin Corporation v. Reitmeyer*, (1900) 2 Ch. 659.

(*q*) *Oxley v. Holden*, 8 C. B. N. S. 666; *British Motor Syndicate v. Taylor*, (1901) 1 Ch. 122.

(*r*) *Townsend v. Haworth*, 12 C. D. 831, *n*.

(*s*) *United Telephone Co. v. Dale*, 25 C. D. p. 782.

(*t*) *Sykes v. Howarth*, 12 C. D. 826; *Incandescent Gas Co. v. New Incandescent Co.*, 15 R. P. C. 81.

(*u*) *Innes v. Short*, 14 T. L. R. 492.

(*x*) *Dunlop Pneumatic Tyre Co. v. Neal*, (1899) 1 Ch. 807.

part, itself the subject of a patent claim ; such repairing can only be effected without infringement by some person holding a licence from the patentee of that component part (y).

Chap. VII.
Sect. 2.

Where a patented article is lawfully made and sold, the patentee licenses the use of the article in the hands of any future buyer, and such buyer is no infringer (z). But a patentee may by notice to a purchaser impose conditions which will have the effect of giving such purchaser a limited licence only, and where this is the case the use of the invention by a purchaser who exceeds the limits of his licence is an infringement (a).

Infringement
by licensee.

Foreigners using an invention within the United Kingdom are liable for infringement, and it is no defence to prove that the infringer has only acted under the orders of a foreign sovereign (b).

By aliens.

An infringement is none the less an infringement because it is committed by workmen in disobedience to express orders to the contrary. If so committed in the course of their employment, the employer will be liable as an infringer (c).

By workmen.

It is no answer to an action for infringement to show that the article or process complained of is in fact an improvement on the plaintiff's patent, if the original invention has been taken. If the pith and marrow of the invention is taken, it is no excuse to say that you have added something or omitted something, even if the addition or omission be an improvement (d). If a person discover a patentable improvement, he is not precluded from patenting his discovery ; but if he cannot use his discovery without using the prior invention, he cannot put his discovery into practice during the term of the original patent without the licence of the original patentee (e). If

Improvements.

(y) *United Telephone Co. v. Nelson*, (1887) W. N. 193.

(z) *Thomas v. Hunt*, 17 C. B. N. S. 183.

(a) *Incandescent Gas Co. v. Brogden*, 16 R. P. C. 179.

(b) *Vavascur v. Krupp*, 9 C. D. p. 359.

(c) *Betts v. De Vitre*, 3 Ch. p. 442.

(d) *Wenham Gas Co. v. Champion Gas Co.*, 9 R. P. C. p. 56; *North British Rubber Co. v. Macintosh*, 11 R. P. C. 477.

(e) *Crane v. Price*, 1 W. P. C. p. 413.

Chap. VII.
Sect. 2.

Taking part
of an invention.

improvements to a patent do not excuse its use, *à fortiori*, alterations which do not improve it will not do so (*f*). A clumsy imitation is none the less an infringement because it is an inferior copy (*g*).

It is not necessary to constitute an infringement that the whole of the patent should be taken. Taking an essential part of the invention is an infringement. If part is taken, there is an infringement, however much it may be disguised or sought to be hidden (*h*). You not only have no right to steal the whole, but you have no right to steal any part of a man's invention (*i*).

Where, however, the patent is for a combination merely, and none of the component parts are claimed separately, it is no infringement to take one of such parts, for parts which are not claimed are not protected (*k*). In considering whether a patent is for a combination only, it is not material to ask whether the word combination occurs in the specification (*l*).

Although to infringe a combination patent it must generally be shown that all essential parts have been taken, yet the taking of a part only will be an infringement if the inventor claims not only the whole combination but also separate parts of it as independent entities (*m*).

Where the patentee claims only a combination, the test of infringement is not whether all the component parts have been taken, but whether the essence of the combination as a whole has been taken. Therefore, any substantial union of the essential parts for the same object will be an infringement, even where all the parts have not been taken or where mechanical equivalents have been substituted for some of them (*n*). The mere fact that there are certain parts omitted

(*f*) *Cheetham v. Nuthall*, 10 B. P. C. 333.

(*g*) *Crompton v. Patent Investments Co.*, 6 R. P. C. 287.

(*h*) *Dudgeon v. Thomson*, 3 App. Ca. p. 53.

(*i*) *Parkes v. Stevens*, 8 Eq. p. 367.

(*k*) *Ib.*; *Davies v. Townsend*, 16 R. P. C. 497.

(*l*) *Proctor v. Bennis*, 4 R. P. C. p. 352.

(*m*) *Clark v. Adie*, 2 App. Ca. 315.

(*n*) *Osmond v. Hirst*, 2 R. P. C. 265; *Harrison v. Anderston Foundry Co.*, 1 App. Ca. 593; *Nordenfelt v. Gardner*, 1 R. P. C. 61, 65.

and certain parts added, if the defendant has really taken the essence of the plaintiff's combination, will not prevent infringement (o).

Although it is not necessary that all the parts of a combination should be found in an infringement, it is necessary that all *essential* parts should be taken, for the omission of even one essential factor constitutes the remaining ingredients in fact a new combination; and the granting of a patent for one combination does not preclude another inventor attaining the same end by a simpler combination with fewer ingredients (p).

The infringer of a patent rarely takes the invention in all its details, but generally introduces variations to disguise the piracy, and it is always a question of degree whether such variations are sufficiently substantial to negative infringement, or are such alterations in non-essential details as would not protect an infringer. What you have to look at is not simply whether in form or in circumstance that which the defendant has done varies from the plaintiff's specification, but whether in reality, in substance and in effect the defendant has availed himself of the plaintiff's invention (q). Where to the eye the two things are so similar that it is necessary to search carefully to discover differences, a strong *primâ facie* case of infringement is at once made out. But such *primâ facie* case may on further examination be rebutted by the discovery of some essential difference (r).

Where the infringer takes the substance of a patented invention but varies the form by omitting certain parts and introducing elements known to be equivalents for the parts so omitted, he is said to infringe by the substitution of mechanical or chemical equivalents (s). But where the object attained is old and the only novelty consists in the substitution of

(o) *Proctor v. Bennis*, 4 R. P. C. p. 354.

(p) *Needham v. Johnson*, 1 R. P. C. 49; *Gwynne v. Drysdale*, 3 R. P. C. 65.

(q) *Walton v. Potter*, 1 W. P. C. p. 587; *Plimpton v. Malcolmson*, 3

P. D. 531; *Macdonald v. Fraser*, 11 R. P. C. 169.

(r) 6 C. D. p. 417, n.

(s) *Dudgeon v. Thomson*, 3 App. Ca. p. 44; *Benno Jaffe, &c. v. Richardson*, 11 R. P. C. 261.

Chap. VII.
Sect. 3.

better equivalents for those already used, the doctrine of mechanical equivalents does not apply; and the patentee cannot bring within his specification any equivalent which he has not described and claimed so as to make its use an infringement of his patent right (*t*).

Where the invention is a new process for attaining an old result, the patentee is entitled only to protection for his process, and it is no infringement to attain the same result by a different process (*u*). But where a new combination of well-known appliances is directed to the attainment of a new result, the patentee is not limited to the precise combination which he has patented, but is allowed a wider ambit for his monopoly (*x*). The doctrine of infringement by equivalents is, however, subject to this, that the equivalents used must be such as were known to be equivalents at the date of the patent; otherwise they constitute new discoveries and may be patented (*y*). There seems to be no difference in this respect between chemical and mechanical equivalents. Thus a chemical patent for the use of a known substance described by its specific name was held not to be infringed by the use of chemical equivalents which were not known to be chemical equivalents at the time the patent was taken out (*z*).

SECTION III.—INTERLOCUTORY RELIEF.

Principles on
which Court
acts.

WHERE a patentee applies for an interlocutory injunction, the Court in adjudicating upon the application seeks as far as possible to maintain the *status quo* until the hearing. The Court considers what it can most satisfactorily do provisionally, and has regard to the degree of convenience and inconvenience to the parties concerned (*a*).

- | | |
|--|--|
| (<i>t</i>) <i>Tweedale v. Ashworth</i> , 9 R. P. C. p. 128. | (<i>y</i>) <i>Unwin v. Heath</i> , 5 H. L. C. 505. |
| (<i>u</i>) <i>Hutchinson v. Pattulo</i> , 5 R. P. C. 351. | (<i>z</i>) <i>Ib.</i> ; Edmunds, p. 348. |
| (<i>x</i>) <i>Badische Anilin v. Levinstein</i> , 24 Q. B. D. 170. | (<i>a</i>) <i>Bridson v. M'Alpine</i> , 8 Beav. 229. |

The Court will not grant an interlocutory injunction lightly, but will carefully consider the validity of the patent, and whether or not the acts complained of are infringements (*b*).

Chap. VII.
Sect. 3.

If infringement is made out, the Court will generally grant an interlocutory injunction in the following cases: (1) When the validity of the patent has already been established in a previous action. (2) When the patent is of old standing and the enjoyment under it has been uninterrupted. (3) When the validity of the patent is not in issue.

When the
Court will
grant relief.

Conversely, in general, if the patent is new and it is endeavoured to be shown that it ought not to have been granted, the Court will not interfere (*c*).

When the validity of the patent has been established in a previous action, and the Court is satisfied that infringement has taken place, the plaintiff is entitled to an interlocutory injunction. A prior decision of a Scotch Court (*d*), and even the award of an arbitrator (*e*), have been held sufficient to justify the application of this rule.

When validity
has been
established.

The patentee's right to an injunction is strengthened if he can show that the defendant has been indemnifying a defendant in the former action (*f*), or that the defendant is a mere cover for a former infringer who is thus seeking to deprive the patentee of the benefits which have accrued to him under an earlier action (*g*).

Where the prior action has been won by the patentee through the defendant failing to appear at the trial, the same inference of validity will not be drawn. *Secus*, where this happens in two successive actions by the same plaintiff (*h*).

The value of a previous decision will not be discounted by a suggestion that the defendants were not in a position to call the best expert evidence (*i*). Nor will the circumstance that a patentee has compromised actions previously brought by

(*b*) *Ib.*

8 R. P. C. 397.

(*c*) *Hill v. Thompson*, 3 Mer. 624.

(*g*) *Moser v. Sewell*, 10 R. P. C.

(*d*) *Dudgeon v. Thompson*, 30

365.

L. T. 244.

(*h*) *Edison-Bell Phonograph v.*

(*e*) *Lister v. Eastwood*, 26 L. T.

Bernstein, 14 R. P. C. 153.

O. S. 4.

(*i*) *Pneumatic Tyre Co. v. Mar-*

(*f*) *Farbenfabriken v. Dawson*,

wood, 13 R. P. C. 347.

Chap. VII.
Sect. 3.

When patent
is of old
standing.

him in respect of the same patent necessarily disentitle him to an interlocutory injunction (*k*).

The fact that a patent is of old standing and the enjoyment under it has been uninterrupted has long been recognised by the Court as a ground for granting an interlocutory injunction. And this is so though there may be considerable doubt as to the validity of the patent (*l*). "The rule is well settled that the Court assumes the validity of a patent and grants an injunction where there has been long and quiet enjoyment under it" (*m*). It is not possible to say exactly what length of time is sufficient for the purpose, but the rule has been acted upon in the case of a patent of six years' standing (*n*).

Long enjoyment, however, is not enough unless it be also undisturbed and exclusive. If the defendant can prove that the invention has been openly used by other persons during the term of the letters patent, this will rebut the inference which the Court draws in the patentee's favour from the long enjoyment (*o*). But disturbance will not defeat the right to an injunction where the patentee has taken proceedings successfully against the infringers. Nor is it necessary that the patentees should actually have gone to trial; if the infringers have submitted and recognised his title, that is sufficient (*p*).

Enjoyment of a patent right must include user. If the patent is of old standing but has only recently been put in use by the patentee, the rule favouring long enjoyment does not apply. The patentee must show actual public user of his patent (*q*).

Where validity
not in dispute.

Where the validity of the patent is not in dispute, it must be assumed to be good, and consequently in such case, where

(*k*) *Bracher v. Bracher*, 7 R. P. C. 421.

(*l*) *Harmer v. Plane*, 14 Ves. 132; *Beeston v. Ford*, 2 Coop. C. C. 68; *Caldwell v. Vanolissengen*, 9 Ha. 415; *Shillito v. Larmuth*, 2 R. P. C. 1.

(*m*) *Davenport v. Jepson*, 4 D. F. & J. p. 447.

(*n*) *Bickford v. Skewes*, 1 W. P. C. 213, 8 L. J. Ch. 188.

(*o*) *Collard v. Allison*, 4 M. & C. 487; *Curtis v. Cutts*, 2 Coop. C. C. 60.

(*p*) *Rothwell v. King*, 3 R. P. C. 379.

(*q*) *Plimpton v. Malcolmson*, 20 Eq. 37.

the infringement is clearly established, the Court will protect even a recent patent by interlocutory injunction (*r*). The issue of validity may be excluded either through the defendant not electing to raise it, or through the relation of the parties being such that as against the defendant the Court must assume it in the plaintiff's favour. Thus a licensee or partner of the original patentee would be precluded from disputing the validity of the patent (*s*).

SECTION IV.—PRACTICE ON INTERLOCUTORY INJUNCTIONS.

USUALLY the Court will not grant an interlocutory injunction if the defendant is willing to keep an account pending the trial of the action (*t*). But if he refuses to do so, or does not appear, the Court will protect the patentee by granting the injunction (*u*). The Court requires a formal undertaking as to the account to be given, and where an undertaking is given a defendant is as much bound as he would be by an injunction, and must comply strictly therewith (*x*). Where defendant is willing to keep account.

A plaintiff who seeks an interlocutory injunction must apply to the Court without delay. Any laches on his part will disentitle him to this relief. Persons who assert legal rights are bound to come promptly, and, *à fortiori*, persons who assert only equitable rights (*z*). The delay which is fatal is delay after knowledge of the infringement. If the plaintiff is in ignorance, he is excused from the consequences of delay (*a*). It is not possible to say what exact amount of delay will be fatal. It must depend upon the circumstances of each case. Delay is fatal.

- (*r*) *Clarke v. Ferguson*, 1 Giff. 310.
 184. (*x*) *Thomson v. Hughes*, 7 R. P. C. 71.
 (*s*) *Lawes v. Purser*, 6 E. & B. 930; *Muntz v. Grenfell*, 2 W. P. C. 88.
 (*z*) *Actien Gesellschaft v. Temler*, 16 R. P. C. p. 449.
 (*t*) *Holophane v. Berend*, 15 R. P. C. 18.
 (*a*) *Crossley v. Derby Gas Co.*, 1 W. P. C. 120.
 (*u*) *Clarke v. Nichols*, 12 R. P. C.

Chap. VII.
Sect. 4.

Nine months (b), six months (c), three months (d), and even three weeks (e) have been held to be sufficient to disentitle the plaintiffs to interlocutory relief. On the other hand, delay of three months (f) and eleven months (g) may be explained, and will not then disentitle a plaintiff to relief. A plaintiff is not bound on a mere threat to immediately commence an action; he is entitled to wait a reasonable time to see whether anything is done in execution of the threat (h). Delay against one infringer is no ground for refusing interlocutory relief against another infringer in regard to whom there has been no such delay (i).

Where
injunction
would stop
works.

The object of the Court in granting an interlocutory injunction is to prevent mischief; therefore, where a direction to keep an account will do the plaintiff ample justice, an injunction will rarely be granted (k). Where the injunction will have the effect of stopping extensive works, and will therefore be likely to do the defendant irreparable mischief, an injunction will not usually be granted on the defendant undertaking to keep an account (l). The rule seems to be that the Court will act against a new trade by injunction, but that it will not stop an established or old business (m). In one case the Court, to prevent the injunction ruining the defendant's business, required the plaintiffs to undertake to supply the defendants, who had been using pirated machines, with lawful instruments until the hearing (n).

Undertaking
as to damages.

When an interlocutory injunction is granted, it is the practice of the Court to require the plaintiff to give an undertaking to abide by any order the Court may make in the defendant's

- | | |
|--|---|
| (b) <i>Actien Gesellschaft v. Temler, ante.</i> | (h) <i>Ib., per Chitty, J.</i> |
| (c) <i>Edison-Bell v. Hough</i> , 11 R. P. C. 594. | (i) <i>Pneumatic Tyre Co. v. Warri- low</i> , 13 R. P. C. 284. |
| (d) <i>Dunlop Pneumatic Tyre Co. v. Stone</i> , 14 R. P. C. 263. | (k) <i>Jones v. Pearce</i> , 1 W. P. C. 122. |
| (e) <i>Greer v. Bristol Tanning Co.</i> , 2 R. P. C. 268. | (l) <i>Neilson v. Thompson</i> , 1 W. P. C. 286. |
| (f) <i>Losh v. Hague</i> , 1 W. P. C. 201. | (m) <i>Plimpton v. Spiller</i> , 4 C. D. 292; <i>North British Rubber Co. v. Gormully Co.</i> , 12 R. P. C. 17. |
| (g) <i>United Telephone Co. v. Equitable Telephone Co.</i> , 5 R. P. C. 233. | (n) <i>United Telephone Co. v. Tasker</i> , 5 R. P. C. 633. |

favour for damages, and this is so even where the case for an interlocutory injunction is clearly made out (*o*). This rule aids the Court in that which is its great object on these applications, viz., to abstain from expressing any opinion on the merits of the case until the hearing (*p*).

Where relief is sought by means of an interlocutory injunction, the Court will act on the evidence before it (*q*). The legal title of the plaintiff, as well as particulars of the infringement, should be clearly set out. The plaintiff ought to state that he is first and true inventor, or if he is an assignee that the patentee is the first and true inventor, and show how his title is derived from the patentee (*r*). The plaintiff ought also to state that he believes that the invention was new or had never been practised in this kingdom at the date of the patent. It is not enough to state that it was believed to be new at the time when the patent was taken out (*s*). The Court will not grant an injunction on mere suspicion, and if the particulars of the infringement are not set out, the plaintiff's evidence will have little weight (*t*). Where an affidavit is made upon information and belief, the deponent must also state the grounds of such belief, or the affidavit will not be evidence (*u*). Although the Court has power to require the attendance of persons who have made affidavits, for the purpose of cross-examination at the hearing of the motion, this power is but rarely exercised; and where witnesses are so summoned their cross-examination will not be allowed to develop into a general trial of the matters in issue as if it were the hearing of the action (*x*).

Where the evidence in support of the motion was distinct and explicit, and the defendants having insufficient evidence

(*o*) *Renard v. Levinstein*, 2 H. & M. 110.
628.

(*p*) *Wakefield v. Buccleuch*, 11 Jur. N. S. 524, *per* Kindersley, V.-C.

(*q*) *Mayer v. Spence*, 1 J. & H. 87.

(*r*) *Wallace on Patents*, p. 477.

(*s*) *Sturtz v. De la Rue*, 5 Russ. 329; *White v. Jennings*, 1 D. & S.

(*t*) *Germ Milling Co. v. Robinson*, 1 R. P. C. 217.

(*u*) *Saccharin Corporation v. Chemical Co.*, 15 R. P. C. p. 55.

(*x*) *Ib.*; *Bracher v. Bracher*, 7 R. P. C. 421. In the former case the cross-examination was before the Court of Appeal.

Chap. VII.
Sect. 5.

to resist the motion applied for an adjournment and offered to keep an account, *Bacon, V.-C.*, refused an adjournment, saying he did not credit the defendant's statement that they had not had time to meet the case (*y*).

Where the application is made *ex parte*, the plaintiff must show *uberrima fides* and disclose to the Court all the facts within his knowledge, so that the Court may be able to judge fairly on the whole case. Otherwise any injunction obtained will be liable to be dissolved by the Court when the concealed facts are discovered (*z*).

Expediting
trial of action.

Sometimes when a motion for an interlocutory injunction is unsuccessful the plaintiff seeks to obtain an order expediting the trial of the action, but such an application will not usually be granted; the rule upon which the Court acts being that where an injunction is not given, the damages awarded at the trial are full compensation for any loss meanwhile sustained by the plaintiff (*a*). But in cases of special hardship the trial will be expedited (*b*).

SECTION V.—PERPETUAL INJUNCTION.

AFTER a patentee has conclusively established the validity of his patent, he may obtain a perpetual injunction against the defendant, extending to the whole duration of the patent, and applying not merely to the particular mode of infringement proved against the defendant, but to all other modes in which the patent may be violated (*c*). But if the patentee amends his specification, an injunction obtained prior to the amendment will no longer hold good (*d*).

Where granted.

Where the Court is satisfied that infringement has been been committed, and that there is a probability that it will

(*y*) *Read v. Andrew*, 2 R. P. C. p. 122.

(*z*) *Dalglish v. Jarvie*, 2 Mac. & G. 231.

(*a*) *Farbenfabriken v. Bowker*, 8 R. P. C. 136.

(*b*) *Edison-Bell v. Hough*, 11 R. P. C. 594.

(*c*) *Hindmarch*, p. 361.

(*d*) *Dudgeon v. Thompson*, 3 App. Ca. 34.

be repeated, an injunction will usually be granted. In such a case the plaintiff has *prima facie* established his right to an injunction, and the Court will require exceptional circumstances to be shown to induce it to refuse this relief (e).

There must, however, be a probability that the infringement is going to be repeated. An injunction is a remedy against future injury, and the Court will not make the order if satisfied that no such injury is likely to occur. It is not because a man has done a wrong that an injunction will be granted against him. The Court must be satisfied of the probability of the continuance of the wrongful act (f).

Where there is no future threatened danger to the plaintiff's rights, an injunction may be refused (g). Though the infringement usually implies an intention to infringe in future, yet if the person who infringes undertakes not to repeat his infringement, or if there is reason to suppose on any other ground that the defendant will not infringe in future, the Court will not usually make an order for injunction (h). Where refused.

There are, however, cases in which damages may be awarded instead of an injunction. In any instance in which a case for injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction, the Court may award damages in its place (i). But delay or acquiescence, which would be fatal to an application for an interlocutory injunction, may not debar a plaintiff from obtaining a perpetual injunction at the trial (k), and, *quære*, whether mere delay to enforce a legal right is a bar to a claim for an injunction unless the delay is such as to cause a statutory bar to the action (l).

It is a good working rule that (1) if the injury to the plaintiff's rights is small, (2) and is one which is capable of being

(e) *Shelfer v. City of London, &c.*, (1895) 1 Ch. 317.

(f) *Proctor v. Bayley*, 42 C. D. 398.

(g) *Proctor v. Bayley*, 42 C. D. 390; *Lyon v. Newcastle Corporation*, 11 B. P. C. 218.

(h) *Edmunds*, p. 432.

(i) *Shelfer v. City of London, &c.*, (1895) 1 Ch. p. 321.

(k) *Proctor v. Bennis*, 36 C. D. p. 758.

(l) *Three Towns Banking Co. v. Maddever*, 27 C. D. 523 (C. A.); and see *Fullwood v. Fullwood*, 9 C. D. 176.

Chap. VII.
Sect. 5.

estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages may be given instead. There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct has disentitled himself from asking that damages may be assessed in substitution for an injunction (*m*).

As above stated, an injunction will not be granted unless there is a probability of future injury. But past infringement of a recent date is *prima facie* evidence of an intention to repeat the wrong (*n*).

Scope of
injunction.

As a rule an injunction will only be granted for the period covered by the life of the patent. When the patent has run out, or is upset on some ground of invalidity, the injunction ceases to operate (*o*).

An injunction granted on proof of one form of infringement binds the defendant as to that and all other possible forms of infringement of the same patent. Where, therefore, there is a new form of infringement after injunction granted, the proper course is not to commence a new action, but to move to attach the defendant for contempt for breach of the injunction (*p*).

An injunction will not be granted if the patent has expired before the hearing (*q*) ; and as a rule the Court will refuse to grant an injunction where the patent is about to expire, for in such case damages will usually be a sufficient remedy (*r*). But where a quantity of infringing goods had been manufactured just before the expiration of the patent, with the object of throwing such goods on the market as soon as the patent was at an end, a perpetual injunction was granted to restrain the sale of such goods both before and after the expiration of the patent term (*s*).

(*m*) *Shelfer v. City of London, &c.*, (1895) 1 Ch. p. 321; *Jenkins v. Hope*, 13 R. P. C. 57.

(*n*) *Proctor v. Bayley*, 42 C. D. 398.

(*o*) *Daw v. Eley*, 3 Eq. 496.

(*p*) *Thompson v. Moore*, 6 R. P. C. 445.

(*q*) *Saccharin Corporation v. Quincey*, (1900) 2 Ch. 246.

(*r*) *Betts v. Gallais*, 10 Eq. 392; *Welsbach Incandescent, &c., Co. v. New Incandescent Co.*, 17 R. P. C. 237.

(*s*) *Crossley v. Beverley*, 1 R. & M. 166, *n*.

An injunction will not be granted against third parties, though they may be ordered to pay costs. Where a plaintiff finds, pending the action, that he has a direct claim against a third party, he ought to apply to amend by adding him as co-defendant; but this cannot be done after trial and for the purposes of an appeal (t).

Where the secretary of the defendant company had taken no part in the acts of infringement, but was made a defendant and appeared and put the fact of infringement in issue, an injunction was granted against him with costs, but no damages (u).

A defendant who by surprise or mistake consented to an injunction will be allowed to withdraw such consent; but the subsequent discovery of facts on which he could found a defence is not a sufficient ground for withdrawal (x).

The injunction usually restrains the defendant, his servants and agents, from infringing; such being the case, the injunction may be useful though the defendant be a foreigner (y).

A patentee's remedy for breach of an injunction is a motion to commit. It is not necessary that the order should have been served, but knowledge that the injunction has been granted must be brought home to the defendant. If there is a breach before there is time to serve the order, the Court will inquire whether the defendant knew of it, and he will not be allowed to escape by any subterfuge. If he was in Court, he will not be allowed to say he did not hear it; if just outside the Court, he will not be heard to say he did not know of it (z). But if the plaintiff by his long delay in getting the order drawn up or otherwise gives the defendant reason to think that he does not intend to enforce the injunction, that is an answer to a motion to commit (a).

Committal will not be ordered lightly; the case must be

(t) *Edison v. Holland*, 6 R. P. C. p. 286. (y) *Badische, &c. v. Johnson*, (1896) 1 Ch. 25.

(u) *Welsbach Incandescent Co. v. Daylight Co.*, 16 R. P. C. 344. (z) *United Telephone Co. v. Dale*, 25 C. D. 784, 785.

(x) *Elias v. Williams*, 1 Times Rep. 144. (a) *Ib.*, p. 786.

Chap. VII.
Sect. 5.

strictly made out on the affidavits (b) ; and the Court will not encourage motions to commit where no real case for committal can be made out, and all the mover wants is an apology and costs (c).

Defendants who disobey an injunction render themselves liable to a motion to commit, even though they act in the *bona fide* belief that they are not guilty of any infringement ; but where they are clearly innocent the Court usually directs that attachment should issue but not be enforced if the defendants deliver up infringing articles and pay costs (d).

Costs.

Where defendant
submits.

If the defendant offers to submit to an injunction, or promises no longer to infringe, it will depend upon circumstances whether he will be ordered to pay the costs incurred subsequently to his submission. The real point is whether the plaintiff must go on with his proceedings, or whether he is already sufficiently protected by the surrender of his opponent. This is practically the same as whether the acts of the defendant have disentitled him to an injunction (e). The plaintiff is generally entitled to go on, if there be any doubt, at any rate until he has obtained his injunction (f), but the Court will use its discretion on the facts of each case.

Where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court will not deprive the plaintiff of his costs (g). But this does not mean that every innocent purchaser of a small quantity of infringing goods incurs a liability to pay the costs of an action to restrain the infringement of the patent (h). The case is, however, different where the quantity of goods purchased is large, that is, large

(b) *Dick v. Haslam*, 8 R. P. C. 196.

(c) *Plating Co. v. Farquharson*, 17 C. D. 49.

(d) *Lyon v. Goddard*, 11 R. P. C. 115.

(e) *Upmann v. Elkan*, 7 Ch. 130 ;
Proctor v. Bayley, 42 C. D. 390.

(f) *Colburn v. Simms*, 2 Ha. 543 ;
Numm v. D'Albuquerque, 34 Beav. 595.

(g) *Cooper v. Whittingham*, 15 C. D. 501.

(h) *American Tobacco Co. v. Guest*, 1 Ch. 630.

enough to justify the plaintiffs in suspecting that the goods were intended for distribution and not for personal use (i).

As a general rule a plaintiff is entitled to issue his writ without notice to the defendant, and after that the only offer which the defendant can properly make is to submit to an injunction and to pay the costs (k). At the same time a plaintiff must not act unreasonably, and if he refuses a reasonable offer, although an injunction is granted, no costs may be given (l). Where the defendant did not dispute the patent, had never used the machine (which he had purchased and which infringed the plaintiff's patent), and did not intend to use it, and undertook not to use it, and the plaintiff would not accept this or any other undertaking, on the undertaking being given to the Court, the motion for an injunction was dismissed with costs (m).

Stay of Execution.

The Court has a discretion to stay proceedings pending an appeal, but the general rule is that in the case of an injunction a stay will not be granted (n). But each case depends largely upon its own special circumstances. If a stay is granted as to the injunction, the defendant will generally be put on terms to keep an account and to appeal promptly (o). If the defendant is engaged in executing orders for the article complained of, and the question of infringement is one of difficulty and doubt, the Court is more disposed to stay the injunction pending appeal (p). But where defendants, after warning that they were infringing, accepted orders and proceeded to execute them, with their eyes open, the Court refused a stay although

(i) *Upmann v. Forester*, 24 C. D. 231.

(k) *Wittmann v. Oppenheim*, 27 C. D. 260.

(l) *Nunn v. D'Albuquerque*, 34 Beav. 595.

(m) *Lyon v. Newcastle Corporation*, 11 R. P. C. 218; and see *Jenkins v. Hope*, 13 R. P. C. 57.

(n) *Otto v. Steel*, 3 R. P. C. 121; *Proctor v. Bennis*, 4 R. P. C. p. 363.

(o) *Kaye v. Chubb*, 4 R. P. C. 23; *National Opalite Syndicate v. Ceralite Syndicate*, 13 R. P. C. p. 658.

(p) *Duclet's v. Whitehead*, 12 R. P. C. p. 191.

Chap. VII.
Sect. 5.

the orders were for public authorities, and it would have been a convenience to the public to grant a stay (q). An injunction has, however, been suspended on the ground of public convenience (r).

(q) *Lyon v. Goddard*, 10 R. P. C.
348.

(r) *Hopkinson v. St. James' Co.*,
10 R. P. C. p. 62.

CHAPTER VIII.

INJUNCTIONS AGAINST THE INFRINGEMENT OF COPYRIGHT.

SECTION I.—PRINCIPLES ON WHICH THE COURT RESTRAINS THE INFRINGEMENT OF COPYRIGHT.

THE jurisdiction of the Court in restraining by interlocutory injunction the violation of copyright is in aid of the legal right, and is founded upon the necessity of protecting the property from irreparable damage pending the trial of the right (*a*). The Court proceeds on the assumption that the person who makes the application has the right which he asserts, but needs the aid of the Court for the purpose of protecting his property from damage pending the trial of the right (*b*). He is not required to make out a clear legal title. All that the Court requires is that a case may be made out presenting a fair *prima facie* title, whether legal or equitable, or a clear colour of title with assertion of right (*c*). An equitable interest, limited in point of time or extent, is sufficient (*d*). But a mere agent to sell has not such a real interest in a work as will entitle him to relief (*e*).

Chap. VIII.
Sect. 1.

The statement of claim may be in the form given in Appendix C. sect. VI. (*f*). If the author of the book is himself the plaintiff, he should allege in his statement of claim, or the affidavit accompanying it, his title by authorship.

Pleading and
affidavits.

(*a*) *Saunders v. Smith*, 3 M. & C. 391; *Sheriff v. Coates*, 1 R. & M. 728. 167.

(*b*) *Ib.*

(*d*) *Sweet v. Cator*, 11 Sim. 572.

(*c*) *Universities of Oxford and Cambridge, v. Richardson*, 6 Ves. 687.

(*e*) *Nichol v. Stockdale*, 3 Sw.

689; *Mawman v. Tegg*, 2 Russ. (*f*) Ord. XIX. r. 5.

Chap. VIII.
Sect. 1.

If the plaintiff claims as assignee, he must by affidavit or otherwise show that the assignment to him has been in writing. He must make a particular title: it is not enough to say that he acquired the copyright, but he must trace his title to the author. But if he happens to be in the situation of assignee of an assignee, it is sufficient for him to show that the assignment to himself was in writing without tracing the title through the mesne assignees from the author. If he does so, the proof of want of title will be thrown on the defendant (*g*). It is not necessary that the plaintiff should specify either in his statement of claim or affidavits the parts of his works which have been pirated. It is sufficient to allege generally that the work of the defendant contains several passages which have been pirated (*h*); but the defendant would usually be entitled to particulars.

There may also be a claim for an injunction to restrain the future infringement of the copyright and for a mandatory order for delivery of copies which have been printed in violation of the copyright. If there be no claim for damages, there may be a claim for an account (*i*).

The statement of defence may be in the form given in Appendix D. sect. VI. (*j*). To the heads of defence there given may be added, if the circumstances of the case warrant it, an allegation that the copyright in question did not exist (*k*), or that the registry is defective (*l*), or that there has been acquiescence on the part of the plaintiff in the alleged infringement (*m*).

In an action for infringement of literary copyright the defendant is bound to give notice in writing of the objections on which he relies, and no other objections will be allowed at the trial (*n*). It seems doubtful whether it is open to a defendant, who does not give such notice, to take an objection

(*g*) *Morris v. Kelly*, 1 J. & W. 481.

(*h*) *Sweet v. Maughan*, 11 Sim. 51; *Hotten v. Arthur*, 1 H. & M. 603.

(*i*) *De Vitre v. Betts*, L. R. 6 H. L. 321.

(*j*) Ord. XIX. 5.

(*k*) *Post*, pp. 278, 292.

(*l*) *Post*, p. 286.

(*m*) *Post*, p. 277.

(*n*) 5 & 6 Vict. c. 45, s. 16.

to the plaintiff's registration arising on the plaintiff's own evidence. In some cases this has not been allowed (*o*); in others it has (*p*).

Chap. VIII.
Sect. 1.

Although the registered owners of a copyright take as tenants in common and not as joint tenants, yet any one or more of them may sue for infringement of the entire copyright (*q*).

If the plaintiff has merely an equitable title, the party in possession of the legal title should be made a party (*r*). If there has been a complete legal assignment, the assignor should not be made a party (*s*). One action cannot be maintained against several persons for distinct invasions of copyright (*t*).

The plaintiff in a copyright action has a right to a full and particular discovery as to the original sources from which the defendant alleges that he has taken his work (*u*). But this is so only where the statutory penalty is really in the nature of liquidated damages (*v*). Where the sum forfeited must be taken to be a penalty, the plaintiff is not entitled to interrogate as to the infringement charged (*w*). So also an order for inspection may be obtained by the defendant on making out a proper case (*x*).

A man who seeks the aid of the Court for the protection of his copyright from violation must show due diligence in coming to the Court. Delay or acquiescence will be fatal to the application, unless it can be satisfactorily accounted for (*y*).

Delay and
acquiescence.

(*o*) *Leader v. Purday*, 7 C. B. 4;
Collette v. Goode, 7 C. D. 842; *Hole*
v. Bradbury, 12 C. D. 887.

post, Chap. XXIV.

(*p*) *Cooté v. Judd*, 23 Ch. D. 727;
Hayward v. Lely, 56 L. T. 419; cf.
Lucas v. Cooke, 13 C. D. 872.

(*u*) *Kelly v. Wyman*, 17 W. R.
399.

(*v*) *Adams v. Batley*, 18 Q. B. D.
625.

(*q*) *Lauri v. Renad*, (1892) 3 Ch.
402.

(*w*) *Saunders v. Wiel*, (1891) 2
Q. B. 321.

(*r*) *Colburn v. Duncombe*, 9 Sim.
151.

(*x*) *Graves v. Mercer*, 16 W. R.
790.

(*s*) *Sweet v. Maughan*, 11 Sim. 51.

(*y*) *Mawman v. Tegg*, 2 Russ.
393; *Baily v. Taylor*, 1 R. & M.

(*t*) *Dilly v. Doig*, 2 Ves. Jr. 486.

73; *Buxton v. James*, 5 De G. & S.
84; *Weldon v. Dicks*, 10 Ch. D.

See *Hudson v. Maddison*, 12 Sim.
416. See further as to parties,

247, ante, pp. 16—19.

Chap. VIII.
Sect. 1.

Nor can a man have relief if his own conduct has led to the state of things that occasions the application (z). The doctrine applies not only to the cases of his conduct towards the particular person with whom the controversy subsists, but also to cases where his conduct with others may influence the Court in the exercise of its equitable jurisdiction (a). According to 3 Will. IV. c. 15, s. 3, and 5 & 6 Vict. c. 45, s. 26, all actions must be commenced within twelve months of the offence. But a man who has neglected for a period of more than twelve months to bring an action for an infringement of his copyright may sue to prevent a repetition of the offence by the publication of a fresh edition of the work containing the pirated matter (b).

Conduct of
plaintiff.

The interference of the Court by injunction being founded on pure equitable principles, a man who comes to the Court must be able to show that his own conduct in the transaction has been consistent with equity. A book accordingly which is itself piratical cannot be protected from invasion (c), nor will the Court protect by injunction a work which is of an immoral, indecent, seditious, or libellous nature (d).

Course of the
Court in dealing
with the
application.

If the Court is satisfied that the alleged title is good, and that there has been a piracy, it may interfere at once, and restrain the piracy *simpliciter* by injunction; but this course will not be adopted except where the title and the fact of its violation are clearly made out. If the title is not clear, or the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right, or to direct the motion to stand over until the hearing, on the terms of the defendant keeping an account. Which of these alternatives shall be adopted depends on the discretion of the Court, according to the case made out (e). If irreparable damage would be caused to the property of the plaintiff by

- | | |
|--|---|
| (z) <i>Rundell v. Murray</i> , Jac. 316; | (d) <i>Southey v. Sherwood</i> , 2 Mer. |
| (a) <i>Ib.</i> ; <i>Saunders v. Smith</i> , 3 M. | 435; <i>Lawrence v. Smith</i> , Jac. 471; |
| & C. 730; comp. <i>Morris v. Ashbee</i> , | <i>Baschet v. London Illustrated, &c.</i> , |
| 7 Eq. 38. | (1900) 1 Ch. 73. |
| (b) <i>Hogg v. Scott</i> , 18 Eq. 444. | (e) <i>Bramwell v. Halcomb</i> , 3 M. & |
| (c) <i>Cary v. Fuden</i> , 5 Ves. 24. | C. 739; ante, p. 20. |

the refusal of the Court to interfere, the injunction will be granted (*f*). If, on the other hand, an injunction would be an extreme hardship on the defendant as compared with the inconvenience to which the plaintiff would be put by being required in the first instance to establish his legal right, the other alternative will be adopted (*g*). Where the work is of a transitory or ephemeral character, greater caution is necessary in exercising the jurisdiction than when the book is of a more permanent character (*h*).

Where the plaintiff's title is clear, an injunction may be granted although there is only one instance of its infringement by the defendant (*i*).

In cases where the Copyright Acts create a new offence and impose a penalty, the ancillary remedy by injunction may still be claimed (*j*): but a man who seeks relief by way of injunction will be required by the Court, as a condition of its assistance, to waive the penalty or forfeiture (*k*).

Waiver of
penalties.

If a case has been made out for an injunction, the Court has then to determine whether the injunction shall be against the whole work or only against a part of it. The extent to which the injunction ought to go must depend in each case upon the extent of the piracy and the nature of the work (*l*). If the pirated matter is considerable in amount, and is so inter-mixed with the original matter that it cannot be separated, the injunction will go against the whole work generally (*m*). Notwithstanding that the effect may be to destroy altogether the use and value of the original matter, the Court will not refrain from granting an injunction. "If," said Lord Eldon (*n*), "the parts which have been copied cannot be separated from

Extent of the
injunction.

(*f*) *Sweet v. Shaw*, 8 L. J. Ch. C. D. 501; *Butterworth v. Kelly*, 4 N. S. 216; *Dickens v. Lee*, 8 Jur. T. L. R. 430.
185.

(*g*) *Saunders v. Smith*, 3 M. & C. C. D. 501.
737; *Bramwell v. Halcomb*, ib. 739;

ante, p. 21. (*k*) *Colburn v. Simms*, 2 Ha. 554.
(*l*) *Lewis v. Fullarton*, 2 Beav. 6.

(*h*) *Matthewson v. Stockdale*, 12 Ves. 275, *per* Lord Eldon; *Spottiswoode v. Clark*, 2 Ph. 154, *per* Lord Cottenham. (*m*) *Mawman v. Tegg*, 2 Russ. 387; *Lewis v. Fullarton*, 2 Beav. 6; *Kelly v. Morris*, 1 Eq. 697.
(*n*) 2 Russ. 390.

(*i*) *Cooper v. Whittingham*, 15

Chap. VIII.
Sect. 1.

those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must abide the consequence of so doing. If a man mixes up what belongs to him with what belongs to another, and the mixture be forbidden by law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any way to mix my literary work with his own, he must be restrained from publishing the literary work which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication prevents also the publication of his literary matter, he has only himself to blame" (o).

When an
injunction will
not be granted.

If, however, the pirated matter is not considerable in quantity or of much value in quality, or if, though considerable in value, it is very small in quantity, and quite out of proportion to the mass of original matter, the Court will not, as a general rule, interfere by way of injunction, but will leave the plaintiff to his remedy by damages (p). In an American case (q) the pirated matter pervaded the whole work, and could not be separated from the rest of the work without destroying the whole work, but, as it was small both in quantity and value, the Court would not interfere, on the ground that the remedy would be disproportionate to the injury.

An injunction—
when granted.

There may, however, be cases where the pirated matter, though small in quantity, is so material and of such value in quality that the Court may feel bound to interfere by injunction (r). In a case where the pirated matter formed a very small portion of the plaintiff's work, but constituted the bulk of the defendant's work, an injunction was granted (s). If an injunction has been granted against a work which is proposed to be published in successive numbers on the ground of piracy

(o) *Low v. Ward*, 6 Eq. 417;
Hogg v. Scott, 18 Eq. 457.

(p) *Mawman v. Tegg*, 2 Russ.
394; *Baily v. Taylor*, 1 R. & M.
73.

(q) *Webb v. Powers*, 2 Wood &
M. 498.

(r) *Bohn v. Bogue*, 10 Jur. 420;
Saunders v. Smith, 3 M. & C. 736;
Bramwell v. Halcomb, ib. 738; *Bell*
v. Whitehead, 8 L. J. Ch. 141;
Leslie v. Young, (1894) A. C. 335.

(s) *Kelly v. Hooper*, 4 Jur. 21.

in the published numbers, the injunction will not be modified so as to permit the publication of the future numbers, while the question of piracy as to the others remains undetermined (t). In a case where to grant an injunction against the whole work would be a harsh step, the Court will not suspend the publication altogether until the hearing of the cause (u).

Chap. VIII.
Sect. 1.

If the pirated matter can be separated from the original matter, the injunction will issue only against that particular part (v).

The Court will not grant an injunction against the whole of a book generally until it has ascertained by inspection or otherwise the quantity of the pirated matter (w). In *Lewis v. Fullarton* (x), a considerable quantity of matter having been shown to have been pirated, Lord Langdale considered himself justified in coming to the conclusion that other parts also of the work had been pirated, and granted an injunction in general terms without ascertaining the whole amount of the pirated matter. But in *Jarrold v. Houlstone* (y), Wood, V.-C., said the Court should grudge no labour in ascertaining how far the injunction should extend. The Court may leave it to the defendant to state in his affidavit exactly how much and what parts he has copied. If there is no reason to suppose a fraudulent intent on his part, this course may be adopted (z).

Inspection of
the book.

A man whose copyright has been invaded is entitled to sue although there may have been no fraudulent intention on the part of the defendant. It is enough that there has been an invasion of the right. The guilt, ignorance, or innocence of the party who invades the right is immaterial (a). The Court has jurisdiction to grant an injunction, though the defendant

Fraudulent
intent not
material, if
there has been
an invasion of
the right.

(t) *Barfield v. Nicholson*, 2 L. J. Ch. 90.

(u) *Ainsworth v. Bentley*, 14 W. R. 630, W. N. (1866) 117.

(v) *Jarrold v. Houlstone*, 3 K. & J. 708; *Morris v. Ashbee*, 7 Eq. 40. See, as to form of order: *Smith v. Chatto*, 23 W. R. 290, 1 Set. 244.

(w) *Mawman v. Tegg*, 2 Russ. 398, per Lord Eldon.

(x) 2 Beav. 6. See *Morris v. Ashbee*, 7 Eq. 40.

(y) 3 K. & J. 722.

(z) *Mawman v. Tegg*, 2 Russ. 395, 404; *Jarrold v. Houlstone*, 3 K. & J. 708.

(a) *Reade v. Conquest*, 11 C. B. N. S. 479; *Scott v. Stanford*, 3 Eq. 718; but see 5 & 6 Vict. c. 45, s. 15, as to imported books.

Chap. VIII.
Sect. 1.

Intent when the
case is doubtful.

acted innocently, and even where there is no threat of repetition of the infringement and the plaintiff has obtained a verdict for nominal damages (*b*). But if it be doubtful whether or not there has been an invasion of the right, the intent becomes a material consideration (*c*). If the defendant denies that he has made any use of the prior publications, but the Court is of opinion, either from the occurrence of the same blunders or misprints in both publications (*d*), or from other causes, that the statement is false, the denial is evidence of a fraudulent intent, and an injunction will issue in cases in which it might not have gone had he admitted that he had made a fair use of, or been under obligation to, the prior publication (*e*). A man who alleges that his work is a fair compilation and not the mere copy of another work should produce his original manuscript. The production of the manuscript is important as evidence of *bona fides* (*f*).

The unauthorised reproduction of copies need not be for sale or for the benefit of the reproducer; it is sufficient to entitle the plaintiff to sue if it tends to injure the plaintiff. A gratuitous distribution is therefore an infringement (*g*).

No injunction
until after
publication.

Until the defendant's work has been published, and there is evidence of the actual contents, an injunction will not be granted upon evidence by the plaintiff of the mode employed by the defendant in preparing his work (*h*).

Defendant not
allowed to sell
copies except by
consent.

Where an injunction is granted, the defendant will not be allowed to sell copies of a book already published upon terms of keeping an account, unless the plaintiff consent (*i*).

Injunctions to
restrain importa-
tion and sale of
copies illegally
printed.

Under the 15th and 17th clauses of 5 & 6 Vict. c. 45, it is an offence to print either for sale or exportation any book in

(*b*) *Lucas v. Williams*, 61 L. J. J. 722.
Q. B. 595.

(*c*) See *Webb v. Powers*, 2 Wood
& M. (Amer.), 497; *Moffatt v. Gill*,
49 W. R. 438.

(*d*) *Mawman v. Tegg*, 2 Russ.
394; *Spiers v. Brown*, 6 W. R.
352.

(*e*) *Spiers v. Brown*, 6 W. R.
352; *Jarrold v. Houlstone*, 3 K. &

(*f*) *Spiers v. Brown*, 6 W. R.
352; *Hotten v. Arthur*, 1 H. & M.
603.

(*g*) *Novello v. Sudlow*, 12 C. B.
177; *Duck v. Bates*, 13 Q. B. D.
pp. 846, 852.

(*h*) *Morris v. Wright*, 5 Ch. 270.

(*i*) *Sweet v. Maughan*, 11 Sim.
51.

which there is a subsisting copyright, without the consent in writing of the proprietor thereof, or to import for sale or hire any book printed abroad in which there is a subsisting copyright without such consent, or to sell or expose for sale any book printed abroad, *knowing* that it was printed without the consent of the proprietor of the copyright, or to have in one's possession any such book. The proprietor of the copyright may have an injunction *ex parte* to restrain a man from importing copies in breach of the statute; if he wishes to restrain the sale of copies imported, notice should be given before taking proceedings (*j*).

SECTION II.—COPYRIGHT IN GENERAL.

THE question has been the subject of much discussion (*k*), but it may be now considered as established that there is no copyright in a published work at common law, and that copyright exists only by statute (*l*).

Copyright within the meaning of the copyright statutes and according to the legal acceptance of the term is the exclusive right or monopoly of multiplying a work of literature or art after it has been published: the right, in other words, of preventing all others from copying by printing or otherwise a work of literature or art which the author has published (*m*). The right commences by publication (*n*). And the first publication must take place in the United Kingdom (*o*). There may be copyright as to a part of a book only. Copyright is divisible so as to be capable of being claimed for such portion of a work as is first published in this country (*p*).

The object of the copyright statutes being to encourage literature and art among British subjects, all persons who by

(*j*) *Cooper v. Whittingham*, 15 C. D. 501.

(*k*) See *Millar v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, ib. 2408, 2 Bro. P. C. 129.

(*l*) *Jeffreys v. Boosey*, 4 H. L. C. 977.

(*m*) *Jeffreys v. Boosey*, 4 H. L. C. 920, *per* Lord Wensleydale.

(*n*) *Ib.* 815.

(*o*) *Routledge v. Low*, L. R. 3 H. L. 100.

(*p*) *Low v. Ward*, 6 Eq. 415.

Chap. VIII.
Sect. 3.

residence within the British dominions at the time of publication owe the Crown a temporary allegiance come within the description of British subjects for the purposes of copyright. An alien friend coming into one of the British colonies, and residing there during and at the time of publication in this country of a work first published in the United Kingdom, is entitled to copyright in the work so published, no matter where his work was composed, or whether he took up his residence solely with a view to publication (*q*). But if at the time of publication a foreigner is not within the British dominions, he is not a person whom the ordinary copyright statutes are meant to protect (*r*). A British author, however, need not be within the dominions at the time of the publication of his work. If the work is first published within the dominions he may have copyright in it, though he be resident abroad at the time of publication (*s*). A work must be printed as well as published here, otherwise it will not be protected (*t*).

The proprietor of a copyright does not lose his right of republication although the book may have been out of print and obsolete and of little or no value for a number of years (*u*).

SECTION III.—LITERARY COPYRIGHT.

Copyright Act—
definition clause.

COPYRIGHT in literature depends upon the 5 & 6 Vict. c. 45. By the second clause of the Act the word "book" includes every volume, division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published. The word "copyright" is defined to be the sole exclusive liberty of printing or otherwise multiplying copies of any subject to which the word "copyright" is applied in the Act.

(*q*) *Ollendorff v. Black*, De G. & S. 209; *Routledge v. Low*, L. R. 3 H. L. 100.

(*r*) See *Jefferys v. Boosey*, 4 H. L. C. 815; but see *Routledge v. Low*, *ante*, per Lords Westbury and Cairns.

(*s*) *Jefferys v. Boosey*, 4 H. L. C. 815. See *Boucicault v. Delafield*, 1 H. & M. 597.

(*t*) 4 H. L. C. 984, per Lord St. Leonards.

(*u*) *Weldon v. Dicks*, 10 C. D. 247.

"Separately published" is not confined to publication as a separate book, but applies also to parts of a volume which are separate and clearly distinguished, as in the case of a volume of stories by different authors (*r*). A "chart or plan" must, it seems, be topographical, or at least not a mere pattern, apparatus, or tool (*w*).

Chap. VIII.
Sect. 3.

The Act does not extend to prints or designs separately published; but when prints and designs form part of a work in the text of which a man has copyright, the right extends to them as well as to the letterpress (*x*). There is no copyright in the mere title of a book (*y*).

Copyright in books published in the lifetime of the author is the property of the author or his assigns during the life of the author and seven years afterwards, or for forty-two years if the latter be the longer term. The copyright in books published after the death of the author lasts for forty-two years (*z*).

Period for which
the copyright
lasts.

The proprietor of a copyright in a book cannot maintain an action in respect of the infringement of his right, unless he shall before commencing the action have caused a due entry of the book to be made in the register book at Stationers' Hall, pursuant to the Act (*a*). Registration on the same day as, but before, the issue of the writ will suffice (*b*). But registration need not precede the infringement complained of (*c*). An entry must be made of the title of the book, of the time of first publication, and of the names and places

Entry in the
register book.

(*r*) *Johnson v. Newnes*, (1894) 3 Ch. p. 669.

(*w*) *Hollinrake v. Truswell*, (1894) 3 Ch. 420; cf. *Hildesheimer v. Dunn*, 64 L. T. 452.

(*x*) *Bogue v. Houlstone*, 5 De G. & S. 275; *Maple v. Junior Army and Navy Stores*, 21 C. D. 369; *Comyns v. Hyde*, 13 R. 172.

(*y*) *Dicks v. Yates*, 18 C. D. 85; *Schore v. Schminke*, 33 C. D. 546.

(*z*) 5 & 6 Vict. c. 45, s. 3. The word "assigns" is defined by the Act to mean and include every person in whom the interest of an

author is vested, whether derived from such author before or after the publication of any book, and whether acquired by gift, bequest, or by operation of law or otherwise, ib. s. 2. See as to construction of s. 4, *Marzials v. Gibbons*, 9 Ch. 518.

(*a*) 5 & 6 Vict. c. 45, s. 24; *Wood v. Boosey*, L. R. 2 Q. B. 341; *Thomas v. Turner*, 33 C. D. 292.

(*b*) *Warne v. Lawrence*, 54 L. T. 371.

(*c*) *Goubaud v. Wallace*, 36 L. T. 704; *Weldon v. Dicks*, 10 C. D. 251.

Chap. VIII.
Sect. 3.

Registration—
what sufficient.

of abode of the publisher and of the proprietor of the copyright (*d*).

An entry is defective where the date of the first publication is entered inaccurately (*e*), or the publishers are not entered accurately, either by their individual names or by the name of the firm (*f*). The registration is bad if the name entered as that of the publisher is not that of the first publisher (*g*). It is, however, sufficient to enter the first publisher under the trade name of the firm and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was or how the copyright devolved on the present proprietor (*h*). Not only the year and the month but also the day of first publication must be entered (*i*). The place of abode of the publisher may be his place of business (*j*). The address of his publishers is a sufficient description by an English author of his place of abode, when he is out of England and has no place of abode there (*k*). Neglect on the part of the officials at Stationers' Hall to register the book may, it would seem, deprive an author of the benefit of the statute (*l*).

A separate article for a periodical is not a book to be registered within the clause (*m*). The registration of the first number of a periodical or magazine protects each subsequent number as it is published, but not numbers yet unpublished (*n*). An injunction cannot therefore be granted restraining copying from future numbers the copyright in which only arises on publication (*o*). A map though published separately must be

(*d*) 5 & 6 Vict. c. 45, s. 13.

(*e*) *Thomas v. Turner*, 33 C. D. 297. Compare *Hayward v. Lely*, 56 L. T. 419.

(*f*) *Low v. Routledge*, 34 L. J. Ch. 717.

(*g*) *Coote v. Judd*, 23 C. D. 727.

(*h*) *Weldon v. Dicks*, 10 C. D. 247.

(*i*) *Mathieson v. Harrod*, 7 Eq. 270; *Page v. Wisden*, 17 W. R. 483; *W. N.* (1869) 68; *Collette v. Goode*, 7 C. D. 842; *Collingridge v.*

Emmott, *W. N.* (1887) 216.

(*j*) *Nottage v. Jackson*, 49 L. T. p. 340.

(*k*) *Lover v. Davidson*, 1 C. B. N. S. 182.

(*l*) *Cassell v. Stiff*, 2 K. & J. 279.

(*m*) *Murray v. Maxwell*, 1 J. & H. 312.

(*n*) 5 & 6 Vict. c. 45, s. 19; see *Henderson v. Maxwell*, 4 C. D. 163.

(*o*) *Cate v. Devon Newspaper Co.*, 40 C. D. p. 507; but see *Bradbury v. Sharp*, (1891) *W. N.* 143.

registered (*p*); not so, however, a bird's eye view or pictorial plan of a city (*q*). The protection afforded to the title of a newspaper or periodical by registration is not prospective, and only dates from the time of the first publication of such newspaper or periodical (*r*). Registration if made before publication is bad, for it not a compliance with the requisitions of the statute (*s*). Registration before publication of the title selected for a forthcoming book does not give copyright in the title so as to entitle the person registering to restrain the use of the title by another (*t*).

Any person associated by the proprietor of a copyright with himself in an entry in the register book has a *primâ facie* right to sue jointly with him in respect of an infringement (*u*).

Omission to register, when relied on as a defence to a suit for infringement, should be distinctly pleaded (*v*), and defendant must give notice in writing of the objections on which he means to rely at the trial (*w*).

Persons aggrieved by any entry in the book of registry may apply by motion or summons to have the entry expunged (*x*).

The assignment of a copyright is not valid unless it be in writing (*y*); but attestation, it would appear, is not necessary (*z*).

To allow the assignee to sue, he must be registered. He can be registered either simply as proprietor, in which case his predecessors need not be registered and the assignment

(*p*) *Stannard v. Lee*, 6 Ch. 348. The face of a barometer displaying special letterpress, is not capable of being registered under the Act as not being, within sect. 2, a book separately published: *Davis & Co. v. Committi*, 54 L. J. Ch. 419, W. N. (1885) 15.

(*q*) *Stannard v. Lee*, 19 W. R. 811.

(*r*) *Correspondent Newspaper Co. v. Saunders*, 13 W. R. 804, 11 Jur. N. S. 540.

(*s*) *Henderson v. Maxwell*, 5 C. D. 892; *Dicks v. Yates*, 18 C. D. 85.

(*t*) *Maxwell v. Hogg*, 2 Ch. 307;

Kelly v. Byles, 13 C. D. 689; *Dicks v. Yates*, 18 C. D. 85.

(*u*) *Stevens v. Wildy*, 19 L. J. Ch. 190.

(*v*) *Chappell v. Davidson*, 18 C. B. 194.

(*w*) *Ante*, p. 276.

(*x*) 5 & 6 Vict. c. 45, s. 14; see *Hole v. Bradbury*, 12 C. D. 899; *Re Poulton*, 53 L. J. Q. B. 320.

(*y*) *Leyland v. Stewart*, 4 C. D. 419.

(*z*) *Cumberland v. Copeland*, 1 H. & C. 124; but see 8 Jur. N. S. App. 148.

Chap. VIII.
Sect. 3.

itself need not be registered; or he can be registered as assignee, in which case the original proprietor (who must himself be registered) must enter the assignment and the name and place of abode of the assignee in the register. A defect in either entry will prevent the assignee from suing; and if the entry of proprietorship is insufficient, there is no valid assignment by subsequent entry (*a*).

It seems that a purchaser of a copyright who has paid his purchase money but has not obtained an assignment cannot sue for an infringement without making his vendor a party (*b*).

It has been denied that there can be a partial assignment of a copyright (*c*); but a man may, under 5 & 6 Vict. c. 45, s. 18, assign a portion of his interest in a copyright (*d*).

Though a statutory copyright must be in existence before it can be assigned at law (*e*), an agreement may be made to assign at a future time (*f*), in which case an equitable title may vest in an assignee (*g*).

A man who employs another for remuneration to compile a book for him is entitled to copyright in the book (*h*).

Assignment by
foreigner.

A foreign author resident abroad cannot, by assigning a published work according to the law of his own country, give the assignee a title which will be recognised in this country (*i*).

Agreement to
publish not an
assignment.

An agreement between publishers and an author to print and publish a work at their own risk, on the terms of dividing equally with him half profits, and stipulating that if another edition should be required the author should make all necessary additions and alterations, is not an assignment of the copyright, but is an agreement of a personal nature or joint

(*a*) 1897, 2 Q. B. p. 4; *Low v. Routledge*, 33 L. J. Ch. 717; *Wood v. Boosey*, L. R. 2 Q. B. 340.

(*b*) See *Colburn v. Duncombe*, 9 Sim. 151; *Howitt v. Hall*, 6 L. T. 348; *Cocks v. Purday*, 5 C. B. 860; *Lacy v. Toole*, 15 L. T. 512; *Levy v. Rutley*, L. R. 6 C. P. 523.

(*c*) See *Jefferys v. Boosey*, 4 H. L. C. 992, *per* Lord St. Leonards.

(*d*) See *Howitt v. Hall*, 10 W. R. 381.

(*e*) *Colburn v. Duncombe*, 9 Sim. 161; *Sweet v. Shaw*, 3 Jur. 217.

(*f*) *Leader v. Purday*, 7 C. B. 4.

(*g*) *Sims v. Marryatt*, 17 Q. B. 281.

(*h*) *Grace v. Newman*, 19 Eq. 623.

(*i*) *Jefferys v. Boosey*, 4 H. L. C. 815.

adventure between the parties, which either is at liberty to terminate upon notice after the publication of a given edition, if at the date of such notice no fresh expense has been incurred by the party to whom such notice has been given (*j*). The benefit of such an agreement is not assignable by the publisher without the consent of the author (*k*). The publisher is not entitled after the termination of the agreement by the author to restrain the publication by another publisher of a new edition before all the copies of the former edition published by himself have been sold (*l*).

A licence to publish is not an assignment of a copyright (*m*). A parol licence to publish given by the author, and followed by his acquiescence, may deprive him of his right to an injunction to restrain the licensee from publishing the work (*n*).

Licence to publish.

An exclusive licensee may bring an action to restrain a publication by third persons, but in such action he must join the licensor as a defendant, if he will not join as a plaintiff (*o*).

In the absence of special agreement to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession (*p*).

Rights of assignor after assignment.

So also where an author sells the copyright in a book to a publisher for a certain specified time, the publisher has the right after the expiration of that period of selling copies of the work he has printed before the expiration of the time limited (*q*).

Copyright is declared by the statute to be personal property (*r*). The right is not personal to the author or his

Copyright is personal property.

(*j*) *Stevens v. Benning*, 6 D. M. & G. 223; *Reade v. Bentley*, 3 K. & J. 271, 4 K. & J. 656; see *Hole v. Bradbury*, 12 C. D. 886.

(*k*) *Griffith v. Tower Publishing Co.*, (1897) 1 Ch. 21.

(*l*) *Warne v. Routledge*, 18 Eq. 497. *Comp. Sweet v. Cator*, 11 Sim. 572.

(*m*) *Reade v. Bentley*, 4 K. & J.

656.

(*n*) *Rundell v. Murray*, Jac. 311; *Platt v. Button*, 19 Ves. 447.

(*o*) *Warne v. Routledge*, 18 Eq. 497; and see *Taylor v. Neville*, 47 L. J. Q. B. p. 254.

(*p*) *Taylor v. Pillow*, 7 Eq. 418.

(*q*) *Howitt v. Hall*, 10 W. R. 381; 6 L. T. 348.

(*r*) 5 & 6 Vict. c. 45, s. 25.

Chap. VIII.
Sect. 3.

Subject-matter
of copyright.

assigns, but descends to his legal personal representatives. They may, after his death, acquire a copyright in writings or letters which the author or writer never intended to publish (*s*). Nor is the privilege confined to cases where there is a known author. A man who has found a manuscript in his ancestor's repository, or got a gift of it, may have a copyright in it although he cannot tell who was the author (*t*).

To come within the protection of the copyright statutes, a work need not consist of new or original matter, nor is the privilege confined to works of literary merit. A mere compilation of old materials, or of materials which are common to all men, and are merely the result of inquiry and industry, may be the subject of copyright if independent work gives an original result (*u*), such as a road or guide book (*v*), a book on chronology (*w*), a directory (*x*), a book of statistics (*y*), a trade (*z*) or shipping list (*a*), an analysis of Acts of Parliament with appendices (*b*), a topographical dictionary (*c*), a court calendar (*d*), a spelling-book (*e*), a book of elementary lessons in arithmetic (*f*), or science (*g*), or a telegraphic code (*h*), an annotated catalogue (*i*), an advertising catalogue (*j*), additions,

(*s*) *Dodsley v. M'Farquhar*, Mor. Dict. of Dec. vols. 19, 20, p. 8308.

(*t*) *Macleane v. Moody*, 20 Dec. of Ct. of Sess., 2nd series, p. 1154.

(*u*) *Jarrold v. Houlstone*, 3 K. & J. 708; *Kelly v. Morris*, 1 Eq. 697; *Morris v. Ashbee*, 7 Eq. 40; *Leslie v. Young*, (1894) A. C. 335.

(*v*) *Cary v. Longman*, 1 East, 358.

(*w*) *Trusler v. Murray*, 1 East, 363, n.

(*x*) *Kelly v. Morris*, 1 Eq. 697; *Morris v. Ashbee*, 7 Eq. 40.

(*y*) *Scott v. Stanford*, 3 Eq. 718.

(*z*) *Cornish v. Upton*, 4 L. T. N. S. 862.

(*a*) *Macleane v. Moody*, 20 Dec. of Ct. of Sess., 2nd series, p. 1154.

(*b*) *Alexander v. M'Kenzie*, 9 ib. p. 748.

(*c*) *Lewis v. Fullarton*, 2 Beav. 6; *Kelly v. Morris*, 1 Eq. 697.

(*d*) *Longman v. Winchester*, 16 Ves. 269.

(*e*) *Lennie v. Pillans*, 5 Dec. of Ct. of Sess., 2nd series, p. 417.

(*f*) *Emerson v. Davies*, 3 Story (Amer.), 768.

(*g*) *Jarrold v. Houlstone*, 3 K. & J. 708; *Jarrold v. Heywood*, 18 W. R. 279, W. N. (1869) 265.

(*h*) *Agar v. Peninsular and Oriental Steam, &c., Co.*, 26 C. D. 637.

(*i*) *Hotten v. Arthur*, 1 H. & M. 603.

(*j*) *Grace v. Newman*, 19 Eq. 624; *Maple v. Junior Army and Navy Stores*, 21 C. D. 369; *Collis v. Cater*, 78 L. T. 613; *Cable v. Marks*, 52 L. J. Ch. 107.

corrections, or original notes to an old work (*k*), reports of cases at law (*l*), marginal notes to reports of cases at law (*m*), or a collection of notes to a book (*n*), or of pictures and illustrations only without any letterpress (*o*), or of letters of a familiar description, or of letters of business (*p*). A mere collection of receipts for cooking cannot, it has been said, be the subject of copyright, as it requires no mental labour (*q*); *sed quære*.

Chap. VIII.
Sect. 8.

It seems, however, that a work will not be protected unless it is a literary production or has something of a literary character (*r*). Thus the Court refused protection to a cardboard pattern containing directions for measuring and cutting out ladies' sleeves (*s*), to a sheet of paper perforated so that when placed in a mechanical instrument it reproduced a copyright tune (*t*), and to an announcement of horses selected as probable winners in particular races (*u*).

The translation of a foreign work which is not protected in this country may be the subject of copyright (*v*). But a work which has been previously published abroad cannot be afterwards the subject of a copyright in this country (*w*). There may, however, be copyright if a work be published simultaneously here and abroad (*x*). To come

Subject-matter
of copyright.

(*k*) *Tonson v. Walker*, 3 Sw. 672
cit. 4 Burr. 2325; *Cary v. Long-*
man, 1 East, 358; *Hotten v. News-*
agents' Co., 1 Set. 671; *Hutchins v.*
Sheard, W. N. (1881) 20.

(*l*) *Sweet v. Maughan*, 11 Sim.
51; *Saunders v. Smith*, 3 M. & C.
729.

(*m*) *Sterens v. Wildy*, 12 L. J. Ch.
190; *Sweet v. Benning*, 16 C. B.
459.

(*n*) *Black v. Murray*, 9 Dec. of Ct.
of Sess., 3rd series, 344; *Hotten v.*
Newsagents' Co., 1 Set. 671.

(*o*) *Maple v. Junior Army and*
Navy Stores, 21 C. D. 369. Comp.
Schove v. Schminke, 33 C. D. 546.

(*p*) *Pope v. Curl*, 2 Atk. 341;
Folsom v. Marsh, 2 Story (Amer.),

100.

(*q*) *Rundell v. Murray*, Jac. 314.
(*r*) *Cable v. Marks*, 52 L. J. Ch.
107; *Schove v. Schminke*, 33 C. D.
546.

(*s*) *Hollinrake v. Truswell*, (1894)
3 Ch. 420.

(*t*) *Boosey v. Whight*, (1900) 1
Ch. 122.

(*u*) *Chilton v. Progress Printing*
Co., (1895) 2 Ch. 29.

(*v*) *Wyatt v. Barnard*, 3 V. & B.
77.

(*w*) *Clementi v. Walker*, 2 B. & C.
861; *Guichard v. Mori*, 9 L. J. Ch.
227; *Chappell v. Purday*, 4 Y. & C.
485.

(*x*) *Boosey v. Purday*, 4 Exch.
145; *Cocks v. Purday*, 5 C. B. 860.

Chap. VIII.
Sect. 8.

within the statute the book must be published in this country (y).

If a publication be of an immoral, indecent, seditious, or libellous nature, there can be no copyright (z). The labour expended on a work of this nature is not labour in respect of which a right of property can exist (a). Upon an analogous principle no copyright exists in a book, though its contents be innocent, which purports falsely to have been written by an author of reputation, and seeks under colour of such a representation to impose on the public; but the mere publication of a book with a false title-page or a false preface is not material if there be no intention to defraud the public and make a profit by the false representation (b).

Certificate of
Stationers'
Company.

A certificate given by the officer of the Stationers' Company is *prima facie* proof of the proprietorship or assignment of copyright or licence, subject however to be rebutted by other evidence (c).

Infringement.

There are two modes in which literary copyright may be infringed, namely, either by *piracy*, or by what is termed *literary larceny*. Where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces to sell a foreign reprint of such a work, this is open *piracy*. Where a man pretending to be author of a book illegitimately appropriates the fruits of another man's labour, this is *literary larceny*.

There is also another mode in which literary property can be invaded which is wholly irrespective of copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work; that is not an invasion of copyright, but a common law fraud which can be redressed by common law remedies (d).

(y) *Clementi v. Walker*, 2 B. & C. 861, *ante*, p. 284.

(z) *Stockdale v. Onwhyn*, 5 B. & C. 173; *Southey v. Sherwood*, 2 Mer. 435; *Laurence v. Smith*, Jac. 471; *Lord Byron v. Dugdale*, 1 L. J. Ch. 239.

(a) *Macaulay v. Shackell*, 1 Bligh,

N. S. 96, 127, *per* Lord Eldon. But see 2 Story, Eq. Jur. 938.

(b) *Wright v. Tallis*, 1 C. B. 893. See *Macfarlane v. Oak Foundry Co.*, 10 Dec. of Ct. of Sess., 4th series, p. 801.

(c) 5 & 6 Vict. c. 45, s. 11.

(d) *Dicks v. Yates*, 18 C. D. 76,

The author of a book protected by copyright has the exclusive right to publish and sell every part of it. A subsequent writer may make a fair and legitimate use of a prior publication, but he may not copy or imitate it to such an extent as to damage the property of the author in his copyright. If so much is taken that the value of the original is sensibly diminished, or the labours of the original matter are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy (*e*). To be a piracy it is not necessary that the later work should be a substitute for the original work (*f*). All that is necessary is that so much should be taken as to affect sensibly the property of the original writer (*g*). Whether the use which has been made of a prior work is a fair and legitimate use or not, is a question not so much of kind as of degree, and depends upon the circumstances of each particular case (*h*). In many cases it is extremely difficult to draw the line between what is a legitimate and what is an unlawful and colourable use of a prior work (*i*). The question in all cases is whether a material and substantial part of the prior work has been taken (*j*). The question of piracy turns most commonly upon the extent or quantity of the materials taken, but it does not depend solely upon the quantity, as regard must also be had to the value of what is taken (*k*).

The taking part of the title of a registered copyright without anything from which the intention to defraud can be inferred is not an infringement of the Copyright Act (*l*).

Extracts or quotations from a book which is protected by

Extracts and
quotations.

90, *per James, L. J.*; and see *post*, Chap. XII.

(*e*) *Scott v. Stanford*, 3 Eq. 718; *Smith v. Chatto*, 23 W. R. 290, W. N. (1874) 231.

(*f*) *Bohn v. Bogue*, 10 Jur. 420. See *Sweet v. Shaw*, 1 Jur. 917.

(*g*) *Bradbury v. Hotten*, L. R. 8 Exch. 1.

(*h*) *Sweet v. Benning*, 16 C. B. 485, *per Maule, J.*; *Moffatt v. Gill*, 49 W. R. 438, 50 W. R. 528.

(*i*) *Ib.*

(*j*) *Chatterton v. Cave*, 2 C. P. D. 42. An author who has parted with his copyright in a book has no right to reproduce substantially the same matter in another publication. *Colburn v. Simms*, 2 Ha. 543.

(*k*) See *Bramwell v. Halcomb*, 3 M. & C. 738; *Tinsley v. Lucy*, 1 H. & M. 747; *Scott v. Stanford*, 3 Eq. 718.

(*l*) *Kelly v. Byles*, 13 C. D. 689.

Chap. VIII.
Sect. 8.

copyright are not forbidden by the law. If they are taken for the purposes of criticism, comment, or illustration, considerable license is allowed (*m*), for the selection of extracts for such purposes, so far from being injurious, is often beneficial to the sale of the books from which they are taken (*n*). But there is a limit to the selection of passages even for the purposes of criticism or comment, though it is not easy to define that limit (*o*). If the selection is made fairly for the purpose of criticising or questioning the opinions expressed therein, or of explaining the criticism, passages of considerable length or of much value may be taken (*p*), but a reviewer may not, under the pretence of criticism, appropriate a large or vital part of the book of another. If the citations, though purporting to be made with a view to criticism, go in part to supersede the original work, and to substitute the review for it, such a use is deemed in law a piracy (*q*). Thus where a man had published a book giving specimens of modern English poetry, with an original essay and biographical notices, and inserted extracts from a poem written by Campbell, an injunction was granted against the publication (*r*).

Extracts and
quotations.

Extracts or quotations may be taken for other purposes than those of criticism, but the limit is much narrower than when they are taken for the purposes of criticism or comment. If so much is taken that the value of the original is sensibly diminished, or the labours of the author are substantially and to an injurious extent appropriated, that is sufficient in law to constitute a piracy (*s*). It is immaterial whether the quantity taken be small or large. The question is whether substantial damage is caused to the property of the author (*t*). Where the proprietor of a Law Digest copied from the Jurist the

(*m*) *Roworth v. Wilkes*, 1 Camp. 94; *Whittingham v. Wooler*, 2 Sw. 428.

(*n*) *Bell v. Whitehead*, 8 L. J. Ch. N. S. 141.

(*o*) *Ib.*

(*p*) *Ib.*; *Roworth v. Wilkes*, 1 Camp. 94.

(*q*) *Maxwell v. Somerton*, 22 W. R.

313, W. N. (1874) 19; *Smith v. Chatto*, 23 W. R. 290, W. N. (1874) 231.

(*r*) *Campbell v. Scott*, 11 Sim. 31.

(*s*) *Bohn v. Bogue*, 10 Jur. 420; *Smith v. Chatto*, 23 W. R. 290, W. N. (1874) 231.

(*t*) *Curtis on Copyright*, 252.

head-notes of the reported cases, it was held to be an abuse of the right of extract (*u*). So also a man was restrained from copying reports of law cases from a work of the plaintiff (*v*). So also, in *Dickens v. —* (*w*), the proprietor of a provincial newspaper was restrained from publishing large extracts from a novel unaccompanied by criticism. So also the printing and selling of a drama, large passages of which were taken from a novel, was held to be an infringement of the copyright in the novel (*x*). So also where a man possessed a copyright in a play, and in a novel which had been founded on the play, a dramatised version of the novel containing scenes and passages which were common to both play and novel was held to be an infringement of the copyright in the play (*y*).

If the extracts are acknowledged, the acknowledgment shows that the party did not intend to pass as his own what belongs to another, but it does not justify or excuse the piracy (*z*).

The most frequent form of piracy which comes before the Court is where the matter of a prior publication is adopted, imitated, or transferred, with more or less colourable alteration to disguise the piracy. Where a book protected by copyright is a historical or speculative work, or a work of invention or imagination, or is generally a work of an original character, the hand of the author can be followed without much difficulty; but where the work relates to a subject which cannot from its very nature be entirely new, and in which the mode of expression and language are necessarily so common that two persons must to a very great extent express themselves in identical terms in conveying the instruction or information which they are anxious to communicate, the difficulty is much increased (*a*). In certain cases of the sort, such as mathematical tables, chronologies, almanacks, calendars, maps, concordances, and similar publications, the result must be clearly identical, and the only

Colourable
imitations.

(*u*) *Sweet v. Benning*, 16 C. B. 459.

(*v*) *Sweet v. Shaw*, 1 Jur. 917.

(*w*) Cited 8 L. J. Ch. 141.

(*x*) *Tinsley v. Lacy*, 1 H. & M. 747.

(*y*) *Reade v. Lucy*, 1 J. & H. 524.

(*z*) *Bohn v. Bogue*, 10 Jur. 420;

Scott v. Stanford, 3 Eq. 718.

(*a*) *Spiers v. Brown*, 6 W. R. 352,

per Wood, V.-C.; *Kelly v. Morris*, 1 Eq. 697.

Chap. VIII.
Sect. 3.

mode of determining whether an unfair use of a prior publication has been made by a subsequent compiler is the copying of errors or misprints (*b*). Dictionaries of all kinds, gazetteers, grammars, arithmetic, or other school books, encyclopedias, itineraries, guide-books, and similar publications, are another class of cases in which much of the matter must be identical, and no great novelty is practicable (*c*). In such cases, if there are no common errors in both, the recurrence of passages identically the same may be sufficient to be a conclusive proof of piracy (*d*). Where the resemblance does not amount to an identity of particular passages, the question becomes in substance whether there be such a conformity and similitude between the two works that the writer of the one must have copied or made an undue use of the other. What degree of resemblance will authorise the inference that one book is a copy or colourable imitation of another is often a question of great nicety, and depends on the circumstances of each particular case (*e*).

Colourable
imitations.

A man is not debarred from consulting a prior work on the same subject. He may examine it to see whether it contains anything which he has forgotten, or whether any reference is made there to some other work bearing on the subject (*f*), and he may if led by the examination to refer to older writers use the same passages in the older writers which have been used in the prior work (*g*). Where the only use which the plaintiff has made of common sources is to reprint them, he will not be able to prevent another person from copying his reprint (*h*). If a man has bestowed much labour, and has honestly exercised

(*b*) *Ib.*

(*c*) *Ib.*; *Jarrold v. Houlstone*, 3 K. & J. 708; *Morris v. Ashbee*, 7 Eq. 40.

(*d*) *Matthewson v. Stockdale*, 12 Ves. 270; *Wilkins v. Aikin*, 17 Ves. 422; *Mawman v. Tegg*, 2 Russ. 385; *Lewis v. Fullarton*, 2 Beav. 6; *Jarrold v. Houlstone*, 3 K. & J. 708; *Hotten v. Arthur*, 1 H. & M. 603; *Lennie v. Pillans*, 5 Dec. of Ct. of Sess., 2nd series, p. 417.

(*e*) *Mawman v. Tegg*, 2 Russ.

394; *Stevens v. Wildy*, 19 L. J. Ch. 190; *Jarrold v. Houlstone*, 3 K. & J. 708; *Hotten v. Arthur*, 1 H. & M. 603; *Pike v. Nicholas*, 5 Ch. 260.

(*f*) *Jarrold v. Houlstone*, 3 K. & J. 716; *Kelly v. Morris*, 1 Eq. 697.

(*g*) *Pike v. Nicholas*, 5 Ch. 252.

(*h*) *Leslie v. Yeung*, (1894) A. C. 335.

his mind upon the work, he is not guilty of piracy, although he may have copied a good deal (*i*) ; but if a man, instead of examining the original sources, or honestly exercising his mind on the work, avails himself of the labours of his predecessor, adopts his arrangement, borrows the materials which such predecessor has accumulated and combined together, or uses his language with colourable alterations or variations, he is guilty of piracy (*j*).

"The true test of piracy," said Story, J., in *Emerson v. Davies* (*k*), "is to ascertain whether the defendant has in fact used the plan, arrangement, or illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof ; or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is a servile or evasive imitation of the plaintiff's work, or a *bonâ fide* compilation from other or independent sources" (*l*). The compiler of a dictionary or guide-book containing information derived from sources common to all, which must of necessity be identical in all cases, if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work at the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results or of referring him to the proper sources of information (*m*). Where a number of passages are proved to have been copied by the copying of the blunders in them, other

- (*i*) *Hotten v. Arthur*, 1 H. & M. 603; *Murray v. Bogue*, 1 Drew. 369; *Pike v. Nicholas*, 5 Ch. 268; *Jarrold v. Heywood*, 18 W. R. 280, W. N. (1869) 265.
 (*j*) *Jarrold v. Houlstone*, 3 K. & J. 716, *per Wood*, V.-C.; *Hotten v. Arthur*, 1 H. & M. 603; *Kelly v. Morris*, 1 Eq. 697.
 (*k*) 3 Story (Amer.), 793.
 (*l*) *Pike v. Nicholas*, 5 Ch. 260.
 (*m*) *Kelly v. Morris*, 1 Eq. 697; *Morris v. Ashbee*, 7 Eq. 40; *Morris v. Wright*, 5 Ch. 285; *Hogg v. Scott*, 18 Eq. 457.

Chap. VIII.
Sect. 3.

passages which are the same with passages in the original work will be presumed *prima facie* to be likewise copied, though no blunders occur in them (*n*).

The principles respecting the liberty of an author dealing with a subject already treated by another have been laid down as follows: He may (1) use all common sources of information: (2) Use the work of another as a guide to these common sources: (3) Use another work to test the completeness of his own (*o*).

Abridgment.

A fair and *bonâ fide* abridgment of a book is not a piracy (*p*); but what constitutes a fair and *bonâ fide* abridgment in the sense of the law is by no means an easy question (*q*). A mere colourable shortening of the original work by the omission of certain passages, or the mere selection or different arrangement of parts of the original work so as to bring the work into a smaller compass, is not a fair and *bonâ fide* abridgment (*r*). To be a fair and *bonâ fide* abridgment, there must be a substantial condensation of the material and intellectual labour and judgment bestowed thereon (*s*). In *Tinsley v. Lacy* (*t*) Lord Hatherley said the cases as to abridgment had gone far enough, and expressed his disapproval of several of the dicta on the subject (*u*).

Digest.

A digest made from the published reports, extracting the principle or the substance of the decision, and putting it into new language, is a fair and *bonâ fide* abridgment (*x*): but the copying from the reports the facts of cases and the judgments,

(*n*) *Mawman v. Tegg*, 2 Russ. 394, *per* Lord Eldon. See *Jurrold v. Houlstone*, 3 K. & J. 722. See also, *ante*, p. 282.

(*o*) Scrutton on Copyright, p. 116, approved in *Moffatt v. Gill*, 49 W. R. 438; *rev. on facts*, 50 W. R. 528.

(*p*) *Gyles v. Wilcox*, 2 Atk. 141; *Bell v. Walker*, 1 Bro. C. C. 451.

(*q*) *Folsom v. Marsh*, 2 Story (Amer.), 107, *per* Story, J.

(*r*) *Gyles v. Wilcox*, 2 Atk. 141; *Butterworth v. Robinson*, 5 Ves.

709; *Sweet v. Shaw*, 1 Jur. 917.

(*s*) *Folsom v. Marsh*, 2 Story (Amer.), 107. See *Webb v. Powers*, 2 Wood & M. (Amer.), 512.

(*t*) 1 H. & M. 747.

(*u*) See also *D'Almaine v. Boosey*, 1 Y. & C. 288, *per* Lord Lyndhurst; *Dickens v. Lee*, 8 Jur. 184, *per* Knight-Bruce, L. J.; and see Lord Campbell's *Life of Lord Hardwicke*, p. 56.

(*x*) *Sweet v. Benning*, 16 C. B. 459.

and the arrangement of them in a different manner, is a piracy and not a fair abridgment (*y*). Chap. VIII.
Sect. 3.

The translation of a work not under the protection of copy- Translations.
right in the country where the translation is published infringes no right of property : but there is some doubt as to whether a translation is or is not an infringement when published in the country where the original work is protected. Certain dicta in *Wyatt v. Barnard* (*z*), *Burnett v. Chetwood* (*a*), and *Prince Albert v. Strange* (*b*), seem to be in favour of the opinion that a translation is not an infringement ; but it is difficult to see upon what principle this doctrine can be upheld. A translation may, it is true, be a work of great labour, and may require the exercise of much industry and skill, but it does not follow that a translator should be able, by merely incorporating with the matter of the book the fruits of his own industry, to absorb the rights of the original author (*c*). In *Burnett v. Chetwood* (*d*) Lord Macclesfield restrained a man from publishing the translation of a Latin work, but the ground on which he proceeded was, that it was not for the benefit of the public that a translation should be published. The translation of a foreign work may be the subject of copyright in this country. Any other man has an equal right to translate the original work, and to publish his translation, but he must not make an unfair use of the translation already published (*e*).

Under the International Copyright Acts, 1844 to 1886, the right of translation is reserved to foreign authors of books published abroad.

The privilege reserved to the author of a work protected by copyright is limited to the multiplication of copies. Any man may make what use he pleases of the work, so long as he does not multiply copies (*f*). The reading or recitation of it in public, or the representation on the stage of a play founded

(*y*) *Butterworth v. Robinson*, 5 Ves. 709.

(*z*) 3 V. & B. 77.

(*a*) 2 Mer. 441, *n*.

(*b*) 2 De G. & S. 693.

(*c*) Curtis on Copyright, 291.

(*d*) 2 Mer. 441, *n*.

(*e*) *Wyatt v. Barnard*, 3 V. & B. 77; *Emerson v. Davies*, 3 Story (Amer.), 780, *per* Story, J.

(*f*) See *Reade v. Conquest*, 9 C. B. N. S. 755; *Tinsley v. Lacy*, 1 H. & M. 747.

Multiplication
of copies.

Chap. VIII.
Sect. 3.

upon it, is not an infringement of the copyright (*g*); but copies may not, upon the occasion of the recitation or performance, be distributed among the audience (*h*). The multiplication of copies, though not for the purposes of sale, of a work which is the subject of copyright, is an infringement of the right (*i*).

Copies of a work which have been lawfully multiplied by a publisher during the term of his agreement for purchase with an author may be sold after the term has expired (*k*).

Copyright in
articles contri-
buted to
periodicals.
5 & 6 Vict.
c. 45, s. 18.

Copyright in articles contributed to an encyclopedia, review, magazine, or other periodical publication, depends upon the 18th section of 5 & 6 Vict. c. 45. The clause declares in substance, that where the proprietor, &c., of an encyclopedia, review, &c., employs a man to write articles for the purpose of publication therein, and such articles shall have been composed on the terms that the copyright shall belong to such proprietor, the copyright of the articles so expressly written for such encyclopedia, review, &c., shall, upon payment, be the property of the proprietor, &c., for the term of twenty-eight years, and that after the term of twenty-eight years the right of publishing, in a separate form, articles written for a review, &c., shall revert to the writer for the remainder of the term given by the Act (*l*). There is a proviso in the clause declaring that the proprietor of an encyclopedia, review, &c., may not publish any such article "separately or singly," without the consent of the author or his assigns, or otherwise than in the encyclopedia, review, &c., unless the article was written on the terms that the copyright therein should belong to the proprietor for all purposes (*m*). The meaning of the proviso, taken with the clause, is not to vest a copyright in

(*g*) *Reade v. Conquest*, 9 C. B. N. S. 755; *Tinsley v. Lacy*, 1 H. & M. 747.

(*h*) *Tinsley v. Lacy*, 1 H. & M. 747.

(*i*) *Novello v. Sudlow*, 12 C. B. 177; *Tinsley v. Lacy*, 1 H. & M. 747; *Agar v. Peninsular and Oriental Steam Co.*, 26 C. D. 637.

(*k*) *Howitt v. Hall*, 10 W. R. 381, 6 L. T. N. S. 348.

(*l*) See *Sweet v. Benning*, 16 C. B. 459; *Walter v. Howe*, 17 C. D. 708. See as to registration, *ante*, p. 286.

(*m*) *Bishop of Hereford v. Griffin*, 16 Sim. 190.

the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose (*n*). An author who has composed an article to be published in a certain periodical work is entitled to require that it be not published otherwise than as part of the periodical. The proprietors or publishers may not publish it as a single book, or separately from the periodical, in conjunction with anything else, or in any other form than as part of the entire number of the periodical in which it first appeared (*o*). The republication in supplemental numbers of a selection of various tales previously published in a periodical is a separate publication within the meaning of the clause (*p*). The Christmas number of a serial must be treated as part of a periodical work (*q*). In the absence of contract, express or implied, the author or his assigns may have an injunction to restrain the proprietor, &c., of an encyclopedia, review, &c., from publishing the article "separately or in another work" (*r*).

A newspaper is within the section and requires registration under the Act in order to give the proprietor the copyright in its contents and to enable him to sue in respect of a piracy (*s*).

The reservation of the right of separate publication to the author of an article for a review or periodical publication for fourteen years after the expiration of the first twenty-eight years does not apply to an article written for an encyclopedia produced entirely by one author on commission (*t*).

Articles
contributed to
periodicals.

If the publisher of a magazine employs an editor, and the editor employs and pays a man for writing in the magazine, the copyright in the articles vests in the publisher (*u*).

Actual payment is a condition precedent to the vesting of the copyright in an article written for an encyclopedia, review,

(*n*) *Ib.*; *Smith v. Johnson*, 4 L. J. Ch. 797. Giff. 632.

(*o*) *Mayhew v. Maxwell*, 1 J. & H. 312; *Smith v. Johnson*, 4 Giff. 632. (*s*) *Walter v. Howe*, 17 C. D. 708; *Trade Auxiliary v. Middleboro'*, 40 C. D. 425.

(*p*) *Smith v. Johnson*, 4 Giff. 632. (*t*) *Bishop of Hereford v. Griffin*, 16 Sim. 190, 194.

(*q*) *Mayhew v. Maxwell*, 1 J. & H. 312. (*u*) *Stubbs v. Howard*, 11 T. L. R. 507.

(*r*) *Ib.*; *Aflalo v. Lawrence*, 70

Chap. VIII.
Sect. 3.

magazine, or other periodical work in the proprietor or publisher. A contract to pay is not sufficient (*x*). The pleadings should show that payment has been actually made (*y*). Proof that the editor has been paid, without proof that the writer has been paid, is not sufficient (*y*). The payment must precede both registration and bringing an action (*z*). The proprietor must also be able to show in order to enable him to sue not only that the author of the article has been paid but that it has been composed on the terms that the copyright therein shall belong to such proprietor (*a*).

The author of a contribution to a periodical who has not parted with his copyright to the proprietor of the periodical may sue an infringer before publishing his contribution in a separate form (*b*).

Copyright in
lectures.
5 & 6 Will. IV.
c. 65.

Report of
speech.

A special statutory copyright exists in lectures, oral or written, by the 5 & 6 Will. IV. c. 65 (*c*).

The reporter of a speech in which the speaker claims no rights is an author within the meaning of the Copyright Act, 1842, and he has copyright in his own report (*d*).

Reports of judi-
cial proceedings.

The House of Lords claims the exclusive right to appoint a publisher of judicial proceedings before itself. This claim was recognised in *Bathurst v. Kearsley* (*e*); and an injunction was granted to restrain the publication of the trial of the Duchess of Kingston (*f*). On the authority of this precedent, Lord Erskine granted an injunction, until the hearing, to restrain the publication of Lord Melville's trial (*g*).

The Crown may perhaps, by virtue of its prerogative, claim the exclusive right of publishing reports of judicial proceedings (*h*), but no such claim has been asserted for many years,

(*x*) *Richardson v. Gilbert*, 1 Sim. N. S. 337; *Collingridge v. Emmott*, W. N. (1887) 216.

(*y*) *Brown v. Cooke*, 16 L. J. Ch. 141.

(*z*) *Trade Auxiliary v. Middlesboro'*, 40 C. D. p. 429.

(*a*) *Walter v. Howe*, 17 C. D. 708; *Lamb v. Evans*, (1893) 1 Ch. 219.

(*b*) *Johnson v. Newnes*, (1894) 3

Ch. 663.

(*c*) *Post*, Chap. XII.

(*d*) *Walter v. Lane*, (1900) A. C.

539.

(*e*) Cited 13 Ves. 504.

(*f*) *Ib*.

(*g*) *Gurney v. Longman*, 13 Ves.

504.

(*h*) See *Millar v. Taylor*, 4 Burr. 2329; Copinger on Copyright, 285.

and in several cases individuals have been acknowledged by the Court as proprietors of copyright in law reports (i). The copyright, however, in such cases is not in the actual judgments of the Court, but in the diligence and skill that may be used in taking notes of what may fall from the judge, and in collecting the judgments and arranging the cases.

Chap. VIII.
Sect. 4.

SECTION IV.—DRAMATIC AND MUSICAL COPYRIGHT.

COPYRIGHT in dramatic pieces and musical compositions depends upon 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45. The literary copyright in this species of property, or the power of multiplying copies, is regulated by 5 & 6 Vict. c. 45, and is in all respects the same as the copyright in other published matter. With respect to the stage copyright in a drama and musical composition, these Acts declare in substance that the author of a published dramatic piece or musical composition or his assignee shall have the sole liberty of representing and performing it at any place of dramatic entertainment (k).

To bring a musical composition within the Dramatic Copyright Act, 1838, it must have the characteristics of a dramatic piece. A song that does not require for its representation either dramatic effect or scenery is not a dramatic piece (l).

Under the Musical Compositions Act, 1882, the proprietor of the copyright in musical compositions or his assignee who wishes to retain the right of public representation or performance must cause to be printed upon the title page of every published copy of such musical composition a notice that the right of public representation or performance is reserved (m).

A certificate given by the officer of the Stationers' Company

(i) *Butterworth v. Robinson*, 5 D. 107; *Chappell v. Boosey*, 21 C. Ves. 709; *Saunders v. Smith*, 3 M. D. 238.
& C. 711; *Sweet v. Shaw*, 1 Jur. (l) *Fuller v. Blackpool Co.*, (1895) 917; *Sweet v. Benning*, 16 C. B. 2 Q. B. 429.

439.
(k) 3 & 4 Will. IV. c. 15, s. 1; 6 (m) 45 & 46 Vict. c. 40, s. 1; see
Vict. c. 45, ss. 20, 21. See *Wall v. Taylor*, 9 Q. B. D. 727, 11 Q. B. ib. ss. 2, 3, where the right of performance and copyright are vested in different owners.

Chap. VIII.
Sect. 4.

is *prima facie* proof of the right of performance or representation, subject to be rebutted by other evidence (n).

The publication in this country of a dramatic piece or musical composition as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece or musical composition or his assignee of the exclusive right of representing or performing it (o).

Dramatic and
musical
copyright.

A room may be a place of dramatic entertainment though it be ordinarily used for other purposes (p). The right conferred by the Act of 1842, both with reference to musical and dramatic compositions, was "the sole right of representing in public" (q). If a representation be given for profit or on payment of money, the room where it is given is a place of public entertainment, but it is not, it seems, essential in order to make the room where a play or musical composition is performed a place of dramatic or public entertainment that a charge should be made for admission. In a case where a dramatic piece was performed in the board room of an hospital for the entertainment of the nurses and others connected with the hospital, it was held not to be a performance in a place of public entertainment (r).

The first public representation or performance of a dramatic piece or musical composition is in the construction of the Act equivalent to a publication (s).

The right is expressly given to the author or his assignee. An employer who merely suggests the subject, but has no share in the design or execution of the work, is not an author (t). Nor is a man a joint author, who employs another to compose a dramatic piece and adds a few additions of his own (u); but an employer who forms the

(n) 5 & 6 Vict. c. 45, s. 11.

(o) *Chappell v. Boosey*, 21 C. D. 238.

(p) *Russell v. Smith*, 12 Q. B. 217.

(q) *Wall v. Taylor*, 11 Q. B. D. 102.

(r) *Duck v. Bates*, 12 Q. B. D. 79; 13 Q. B. D. 843; cf. *Novello v. Sudlow*, ante, p. 282.

(s) 5 & 6 Vict. c. 45, s. 20. See *D'Almaine v. Boosey*, 1 Y. & C. 299, per Lord Lyndhurst; *Bouicault v. Chatterton*, 5 C. D. 275.

(t) See *Shepherd v. Conquest*, 17 C. B. 427; *Eaton v. Lake*, 20 Q. B. D. 378.

(u) *Levy v. Rutley*, L. R. 6 C. P. 528.

general design of an entertainment, and employs another to compose a musical composition as part of, or as accessory to the entertainment, is the author of the whole entertainment within the meaning of the statute (*x*). A man however who adapts words of his own to an old air, and adds thereto a prelude and accompaniment also his own, acquires a copyright in the combination (*y*). So also does a man who arranges for the piano the music of an opera, containing no pianoforte score, acquire a copyright in the arrangement (*z*).

Chap. VIII
Sect. 4.

The assignment of the right to represent a dramatic piece or perform a musical composition must be in writing (*a*), but need not be by deed (*b*). It seems that a receipt for the purchase money may operate as an assignment of the right to represent a drama (*c*). The assignment of the copyright in a book containing a dramatic piece of musical composition does not carry with it the right to represent the dramatic piece or to perform the musical composition unless some entry be made in the registry book that it was the intention of the parties that the assignment should have the effect (*e*). The proprietor, however, of the right of representing a dramatic piece or performing a musical composition is not bound to register (*f*).

Dramatic and
musical
copyright.

It is not necessary in order to constitute an infringement of copyright to show that the defendant knowingly invaded the plaintiff's right (*g*).

It is not an infringement to dramatise and represent a novel, but to print such drama is an infringement of the

Where a novel
is dramatised.

(*x*) *Hatton v. Kean*, 7 C. B. N. S. 269. *Comp. Eaton v. Lake*, 20 Q. B. D. 378.

(*y*) *Lover v. Davidson*, 1 C. B. N. S. 182.

(*z*) *Wood v. Boosey*, L. R. 2 Q. B. 340, 3 Q. B. 223.

(*a*) *Shepherd v. Conquest*, 17 C. B. 427; *Eaton v. Lake*, 20 Q. B. D. 378.

(*b*) *Marsh v. Conquest*, 17 C. B. N. S. 418.

(*c*) *Lacy v. Toole*, 15 L. T. 512.

(*e*) 5 & 6 Vict. c. 45, s. 22. See *Lacy v. Rhys*, 4 B. & S. 873; *Marsh v. Conquest*, 17 C. B. N. S. 418; *Ex parte Hutchins and Romer*, 4 Q. B. D. 90, 483.

(*f*) 5 & 6 Vict. c. 45, s. 24. *Russell v. Smith*, 12 Q. B. 217; *Lacy v. Rhys*, 4 B. & S. 873; *Marsh v. Conquest*, 17 C. B. N. S. 418.

(*g*) *Reade v. Lacy*, 1 J. & H. 524.

Chap. VIII.
Sect. 4.

copyright in the novel (*h*). If the novel dramatised be founded on a play, the acting of such a drama is an infringement of the play (*i*), and the printing of such a drama is an infringement of both novel and play (*k*). But if a man who has published a novel afterwards founds a drama upon it, but the drama has not yet been published or represented on the stage, there is no invasion of the stage copyright in the drama, if another person dramatises the novel (*l*). Representation of a piece substantially similar will not be an infringement if in fact such piece is original and not derived from the plaintiff's play (*m*).

Dramatic and
musical
copyright.

To constitute an infringement of dramatic copyright, a material and substantial part of the play must be taken. Though an appreciable part be taken, it does not follow as a consequence of law that the plaintiff's right is invaded, if such part be unimportant and trifling in relation to the effect of the whole composition (*n*). A dramatic representation in which a substantial and material part of the music of an opera has been performed constitutes an infringement of the sole right of performing that music, even though the operatic score may have been obtained by independent labour bestowed upon an unprotected pianoforte arrangement (*o*). So also is there an infringement of the right to a musical composition where a man appropriates a material part of the music of an opera and so publishes it in the form of quadrilles and waltzes that the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding of variations makes no difference in the principle (*p*).

(*h*) *Warne v. Seebohm*, 39 C. D. 73.

(*i*) *Reade v. Conquest*, 11 C. B. N. S. 479; *Schlesinger v. Turner*, 63 L. T. 764.

(*k*) *Reade v. Lacy*, 1 J. & H. 524.

(*l*) *Toole v. Young*, L. R. 9 Q. B. 523; *Schlesinger v. Bedford*, 63 L. T. 762.

(*m*) *Reichardt v. Sapte*, (1893) 2 Q. B. 308.

(*n*) *Chatterton v. Cave*, 3 App. Ca. 483.

(*o*) *Boosey v. Fairlie*, 7 C. D. 302; *Fairlie v. Boosey*, 4 App. Ca. 711.

(*p*) *D'Almaine v. Boosey*, 1 Y. &

The part owner of a dramatic entertainment cannot grant a licence for its representation without the consent of all the other part owners (*q*) ; but any one or more of the registered owners may maintain an action against a stranger for an infringement of the entire copyright (*r*). The owner of the exclusive right to represent a dramatic piece may grant a licence for the performance of the piece without formally assigning his exclusive right. Such a licence may be transferable, and after granting such a licence the owner of the exclusive right cannot without the consent of the licensee for the time being bring an action to restrain a third party from representing the piece within the limits expressed by the licence (*s*).

Certain penalties are imposed by 3 & 4 Will. IV. c. 15 (*t*), for an infringement of the provisions of the Act, but an injunction may nevertheless be obtained to restrain the representation or performance of any dramatic piece or musical composition in violation of the provisions of the Act (*u*).

Where an action is brought for the infringement of Pleading. dramatic or musical copyright, the statement of claim must allege all the material facts necessary to show that the right to maintain the action is vested in the plaintiff (*x*) ; it must allege the date of the first publication, *i.e.*, the first representation or performance of the piece or composition (*y*) ; and also that the plaintiff was, as the case may be, either the original proprietor of such right of representation or performance, or that he became the proprietor by assignment and how he became so. Registration of such proprietorship need not be alleged. The statement of claim must also allege the representation or performance by the defendant without the consent in writing

C. 288 ; see *Chappell v. Sheard*, 1 Jur. N. S. 996.

(*q*) 3 & 4 Will. IV. c. 15, s. 2 ; *Powell v. Head*, 12 Ch. D. 686.

(*r*) *Lauri v. Renad*, (1892) 3 Ch. 402.

(*s*) *Taylor v. Neville*, 47 L. J. Q. B. 254, W. N. (1878) 3.

(*t*) Amended by 51 & 52 Vict. c. 17.

(*u*) *Russell v. Smith*, 15 Sim. 181 ; *Reade v. Lacy*, 1 J. & H. 524 ; see, as to form of order, *Boucicault v. Warde*, 1 Set. 672.

(*x*) Ord. XIX. 4.

(*y*) See *ante*, 304.

Chap. VIII.
Sect. 5.

of the plaintiff and the place of such representation or performance, and the fact that such place was a place of public entertainment.

The defendant in his statement of defence must deny the allegations in the statement of claim (z). He may allege that the right is not vested in the plaintiff, or that the plaintiff by reason of his having granted an exclusive licence of such right cannot alone maintain the action (a), or he may deny the plaintiff's right by alleging that there has been a prior publication of the piece or composition in a foreign country within the meaning of 7 Vict. c. 12, s. 19 (b).

The costs of such actions are now in the discretion of the Court (c).

SECTION V.—COPYRIGHT IN PRINTS, ENGRAVINGS, AND ETCHINGS.

Copyright in
prints, engravings,
etchings,
and lithographs.

COPYRIGHT in prints, engravings, and etchings depends upon 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57. These Acts have been extended to Ireland by 6 & 7 Will. IV. c. 59. The protection of these Acts has been extended to prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely (d). But as the Act of 1862 (e) gives the author of an original painting or drawing the sole right of copying the same, it is easier to secure protection for engravings under its provisions by protecting the copyright of the original picture or drawing, instead of the engraving.

A copy is piratical within these Acts if it comes so near the print, engraving, &c., as to give persons seeing it the idea created by the original (f). The copy need not be exact:

(z) Ord. XIX. 5; Appendix D.,
sect. VI.

(a) *Taylor v. Neville*, 26 W. R.
299.

(b) See *Boucicault v. Chatterton*,
5 C. D. 267.

(c) 51 & 52 Vict. c. 17, s. 2.

(d) 15 & 16 Vict. c. 12, s. 14.

(e) 25 & 26 Vict. c. 68.

(f) *West v. Francis*, 5 B. & Ald.
743. See this dictum discussed in
Hanfstaevel v. Baines, (1895) A. C.

it is a piracy if it be substantially a copy (*g*). The copying an engraving by the process of photography is a piracy (*h*). The language of the statutes includes any copies made by any mechanical or chemical process, and capable of being multiplied indefinitely, but does not apply to copies made by hand, or to designs transferred to an article of manufacture (*i*). A pattern accordingly to be used for Berlin wool taken from an engraving was held not to be a copy within the meaning of the statutes (*k*). An engraver is entitled to the protection of these statutes, although he may have copied from a drawing or a picture (*l*). A bird's-eye view or a pictorial plan of a city comes within the protection of the statutes (*m*). But maps and plans, being defined as books in the Act of 1842, are no longer to be treated as works of art (*n*).

The inventor of the subject of an artistic design, though himself unable to draw, may nevertheless have a copyright in the design in question, if he has employed another person to make the drawings for him and communicated his ideas to that person (*o*).

The sale of an electrotype block to a purchaser to use for his advertisements confers no right on a person to whom he lends the block for reproduction, and such person may be restrained by the owner of the copyright from using the block (*p*).

Registration is not requisite, but it is required by 8 Geo. II. c. 13, s. 1, that the day of the first publication shall be truly engraved with the name of the proprietor on each plate, and printed on every copy. The fulfilment of these requisitions is necessary to enable a man to recover the penalties imposed by the statute. It was formerly doubted whether an action could not be maintained in spite of non-compliance with these requisitions (*q*).

Copyright in
prints,
engravings, &c.

20; and see *Roworth v. Wilkes*, 1 Camp. 94; *Lucas v. Cooke*, 13 C. D. 872.

(*g*) *Moore v. Clark*, 9 M. & W. 692.

(*h*) *Gambart v. Bull*, 14 C. B. N. S. 306; *Graves v. Ashford*, L. R. 2 C. P. 410; *Ex parte Beal*, ib. 3 Q. B. 387.

(*i*) *Ib.*

(*k*) *Dicks v. Brooks*, 15 C. D. 22.

(*l*) *Newton v. Cowie*, 4 Bing. 234.

(*m*) *Stannard v. Harrison*, 19 W. R. 811.

(*n*) *Stannard v. Lee*, 24 L. T. 459.

(*o*) *Stannard v. Harrison*, 19 W. R.

811.

(*p*) *Cooper v. Stephens*, (1895) 1 Ch. 567; and see *Marshall v. Bull*, 85 L. T. 77.

(*q*) *Blackwell v. Harper*, 2 Atk.

93; *Roworth v. Wilkes*, 1 Camp. 94.

Chap. VIII.
Sect. 5.

It may however be considered as established, that no action can be maintained unless the date and name of the proprietor be engraved thereon according to statute (*r*). If a trading firm are the proprietors, it is sufficient that the trading name of the firm is put on the article (*s*). It is not necessary that the designation "proprietor" be added to the name (*t*).

Prints, engravings, &c., &c., forming part of a book, are protected by 5 & 6 Vict. c. 45, and need not comply with the requisitions of these statutes (*u*).

Prints engraved and struck off abroad but published in this country are not protected by these statutes (*x*). But under the provisions of the International Copyright Act, 7 & 8 Vict. c. 12, s. 19, the inventor, designer, or engraver of a print first published abroad may have protection on complying with the provisions of 8 Geo. II. c. 13. There can be no copyright in a foreign print or engraving, unless the date of the publication and the name of the proprietor are engraved on the plate, and printed on the print, &c., &c., as required by the statute (*y*).

If the print, engraving, &c., &c., differs materially from the original in character, it is not a piracy within 17 Geo. III. c. 57 (*z*).

An action may be maintained against a man for selling pirated copies of a print or engraving, though he may have no knowledge that they are piratical (*a*).

No action will lie to recover the value of immoral, obscene, or libellous prints (*b*). Nor can a copyright exist in an engraving of an immoral character (*c*).

(*r*) *Brooks v. Cock*, 3 A. & E. 861; *Page v. Townsend*, 5 Sim. 395. 138; *Graves v. Ashford*, L. R. 2 C. See *Jefferys v. Boosey*, 4 H. L. C. P. 410. 959, *per* Lord Cranworth.

(*s*) *Rock v. Lazarus*, 15 Eq. 107.

(*y*) *Avanzo v. Mudie*, 10 Exch. 203.

(*t*) *Newton v. Cowie*, 4 Bing. 234; *Graves v. Ashford*, L. R. 2 C. P. 410.

(*z*) *Martin v. Wright*, 6 Sim. 297; *Newton v. Cowie*, 4 Bing. 234. *per* Lord Wynford.

(*u*) *Bogue v. Houlstone*, 5 De G. & S. 275; *Maple v. Junior Army and Navy Stores*, 21 C. D. 369; *Comyns v. Hyde*, 13 R. 172.

(*a*) *Gambart v. Sumner*, 5 H. & N. 5.

(*b*) *Fores v. Johnes*, 4 Esp. 97.

(*x*) *Clementi v. Walker*, 2 B. & C.

(*c*) *Du Bost v. Bereasford*, 2 Camp. 511.

An action in respect of the rights conferred by the statutes will lie either for an injunction to restrain a threatened or the continuance of an existing infringement, or for damages for a past infringement and for the forfeiture to the plaintiff of the plate or plates on which the print is copied and every sheet on which the print is copied or printed.

Chap. VIII.
Sect. 6.

Remedies.

The statement of claim may be in the form given in Pleading. Appendix C., sect. VI. (*d*). It must allege all the material facts showing that the right invaded is vested in the plaintiff, and in particular it must allege that the provisions of the Act 8 Geo. III. c. 13, with reference to the engraving or printing of the day of first publication and the name of the proprietor on each plate or print, have been complied with (*e*).

The statement of defence may be in the form given in Appendix D., sect. VI. (*f*). To the heads of defence there given may be added, if the circumstances of the case warrant it, an allegation that the copyright did not exist (*g*).

SECTION VI.—COPYRIGHT IN PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

COPYRIGHT in paintings, drawings, and photographs depends on 25 & 26 Vict. c. 68. The Act provides that the author of every original painting, drawing, and photograph, and his assigns, shall have the sole and exclusive right for a certain period of copying such painting or drawing and the design thereof, or such photograph and the negative thereof.

A photograph taken from a picture or an engraving is an original photograph in so far that to copy it is an infringement of the copyright within the statute (*h*).

Copyright under the Act is capable of being assigned by any note or memorandum in writing signed by the proprietor of

(*d*) Ord. XIX. 4.

(*e*) *Ante*, p. 309.

(*f*) Ord. XIX. 5.

(*g*) *Ante*, p. 276.

(*h*) *Graves' Case*, L. R. 4 Q. B. 723.

Chap. VIII.
Sect. 6.

the copyright or by his agent appointed for that purpose in writing (i).

An assignment of the copyright in a painting may be limited by the terms of the instrument so as to amount merely to a licence to copy it for the limited purpose of producing an engraving of a certain size; and where such is the case, the right of producing copies of the painting in other ways or by engravings of other sizes remains in the owner of the copyright, and can be assigned to any other person (k).

Registration.

25 & 26 Vict. c. 58, s. 4, provides for registration of proprietorship and assignment of copyright in paintings, and enacts that no proprietor of any such copyright shall be entitled to the benefit of the Act until registration, and that no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration (l). This section, though it prevents an assignee from suing before the assignment to him has been registered, does not render it necessary that all or any previous assignment should also be registered, or that the copyright of the original author should be registered (m). Registration of the proprietorship of the copyright is only *prima facie* evidence of the title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration (n).

A man who employs an artist to take a negative is not the author of the photograph. If he registers himself as the author, the registration is bad (o).

A man to whom the right of reproducing an imitation of a picture has been assigned by the proprietor of the picture has a right to sue for a violation of his copyright as long as the agreement is in force. It is immaterial that there may have been no registration by him of the assignment. He may sue as licensee (p).

- | | |
|--|---|
| (i) 25 & 26 Vict. c. 68, s. 3; see
<i>Strahan v. Graham</i> , 15 W. R. 487. | (n) <i>Lucas v. Cooke</i> , 13 C. D.
876. |
| (k) <i>Lucas v. Cooke</i> , 13 C. D.
872. | (o) <i>Nottage v. Jackson</i> , 11 Q. B.
D. 631; <i>Wooderson v. Tuck</i> , W. N.
(1887) 209. |
| (l) <i>Dupuy v. Dilkes</i> , 48 L. J. Ch.
682, W. N. (1879) 145. | (p) <i>Tuck v. Canton</i> , 51 L. J. Q. B.
363. |
| (m) <i>Graves' Case</i> , L. R. 4 Q. B. 715. | |

If a drawing is merely a reproduction with improvements of a previous drawing, it is not an original drawing within the Act. If the improvements are substantial, there may be copyright in them alone, as in the case of new editions of books (*q*).

Chap. VIII.
Sect. 6.

Where a photograph is taken for a paying customer, the photographer will be restrained from multiplication of copies, if the sitter is registered as proprietor (*r*), and even if he is not registered, on the ground of implied contract or confidence (*s*). Where the photographer asks for a sitting, and the sitter pays nothing, the copyright will be the photographer's (*t*). The question in each case is :—Was the negative taken for the sitter for valuable consideration? If so, the copyright belongs to him (*u*).

Copyright in
photographs,
drawings, &c.

The Act of 1862 differs from the Literary Copyright Act, 1842, in requiring registration to *precede the infringement*, instead of simply preceding the suing for such an infringement (*x*). But, as stated above, it is sufficient for an assignee to register his own assignment, without any registration of the original copyright or prior assignments (*y*).

Infringement consists in the reproduction of the picture or its design by any means and in any size, so as to interfere with the artist's reputation or the commercial value of his work (*z*). A reproduction of part of a design is also an infringement (*a*). A mere descriptive sketch is not a reproduction of the design (*b*). A copy, not directly from the plaintiff's work, but from a legitimate reproduction of it, may be an infringement (*c*).

Infringement.

It is immaterial that the defendant's picture is a bad or inartistic copy (*d*), or whether it is made for profit or not (*e*);

- | | |
|---|--|
| <p>(<i>q</i>) <i>Thomas v. Turner</i>, 33 C. D. 715.
292.
(<i>r</i>) 25 & 26 Vict. c. 68, s. 1.
(<i>s</i>) <i>Pollard v. Photographic Co.</i>,
C. D. 345.
(<i>t</i>) <i>Melville v. Mirror of Life Co.</i>,
(1895) 2 Ch. 531.
(<i>u</i>) <i>Ib.</i>
(<i>x</i>) <i>Tuck v. Priestler</i>, 19 Q. B. D.
629.
(<i>y</i>) <i>Graves' Case</i>, L. R. 4 Q. B.</p> | <p>(<i>z</i>) <i>Ex parte Beal</i>, L. R. 3 Q. B.
289; <i>Dicks v. Brooks</i>, 15 C. D. 22;
but see (1894) 3 Ch. p. 130.
(<i>a</i>) <i>London Stereoscopic Co. v.</i>
<i>Kelly</i>, 5 T. L. R. 169.
(<i>b</i>) (1894) 3 Ch. p. 134.
(<i>c</i>) (1894) 3 Ch. p. 127; (1895)
A. C. p. 28.
(<i>d</i>) (1895) A. C. p. 26.
(<i>e</i>) (1894) 2 Ch. p. 9.</p> |
|---|--|

Chap. VIII.
Sect. 6.

but it must be something in the nature of a picture. A *tableau vivant*, for instance, would not be an infringement (*f*).

Where a picture has been engraved, there may be either infringement of the copyright in the painting, or infringement of copyright in the engraving; but in the latter case it must be proved that the piratical copy was made from the engraving and not from the painting, as a second engraving made direct from the painting does not infringe the copyright in the first engraving (*g*).

The person to sue for an infringement must be the proprietor when the infringement is committed (*h*).

The copyright cannot be registered in the name of the proprietor's nominee or agent (unless the property is actually vested in such person as trustee), and if this is done, joinder of the unregistered proprietor as co-plaintiff with the nominee or agent will not render the action maintainable (*i*).

The defendant's ignorance that he has been dealing with a copyright picture is no defence (*k*), and printers, though merely innocent agents, are liable for infringement as well as the publishers (*l*).

Importation of
pirated works.

The importation into this country of imitations of paintings, drawings, and photographs which come within the provisions of the statute is expressly prohibited (*m*).

Remedies.

A remedy by action for damages is given by the 11th section of the statute to the owner of the copyright, and it is declared that he may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations and negatives of photographs, or may recover damages for the retention or conversion thereof. No limitation of time within which actions are to be brought is prescribed by the Act. The right to damages under the section extends to the sale after registration of copies made and imported before registration (*n*).

(*f*) (1894) 2 Ch. pp. 6, 8, 10. 465.

(*g*) *Lucas v. Cooke*, 13 C. D. 872;
but see *Tuck v. Canton*, 51 L. J. Q.
B. 363.

(*k*) (1895) A. C. p. 29.

(*l*) *Baschet v. London Illustrated*,
&c., (1900) 1 Ch. 73.

(*h*) *London Printing Alliance v.*
Cox, (1891) 3 Ch. 291.

(*m*) 25 & 26 Vict. c. 68, s. 10.

(*n*) *Tuck v. Priestler*, 19 Q. B. D.

(*i*) *Petty v. Taylor*, (1897) 1 Ch. 629.

The statement of claim should allege all the material facts which show that the right for an invasion of which the action is brought is actually vested in the plaintiff (*o*); and in particular it must state when the registration by the plaintiff took place (*p*). If the plaintiff claims as assignee of the copyright, he must state that the assignment has been made to him and in writing.

Chap. VIII.
Sect. 7.

Pleading.

SECTION VII.—COPYRIGHT IN SCULPTURE AND BUSTS.

COPYRIGHT in sculpture and busts depends on 54 Geo. III. c. 56. That statute enacts that every person who shall make or cause to be made any new and original sculpture or model or cast of any of the things there mentioned shall have the sole right and property therein for a certain period, provided he do in every case cause his name with the date to be put on all and every such thing before it is published (*q*).

Casts of fruit and leaves, being new and original, are "matters of invention in sculpture" within this enactment (*r*).

A public exhibition of the work is equivalent to publication (*s*).

The statute gives an action for damages against any person who shall make or import or cause to be made and imported or exposed to sale or otherwise disposed of any pirated copy or pirated cast, whether it be produced by moulding or copying from or imitating in any way the original (*t*).

Representing a statue as a *tableau vivant* is not an infringement of the copyright therein. It seems that the drawing or painting of a statue would not infringe copyright in the statue, and conversely that a statue or bas-relief representing a picture would not infringe copyright in the picture (*u*).

(*o*) *Ante*, p. 276.

(*s*) *Turner v. Robinson*, 10 Ir. Ch.

(*p*) *Dupuy v. Dilkes*, W. N. 516.
(1878) 145.

(*t*) 54 Geo. III. c. 56, s. 3.

(*q*) 54 Geo. III. s. 1.

(*u*) *Hanfstaeigl v. Empire Theatre*,

(*r*) *Caproni v. Alberti*, 65 L. T. (1894) 2 Ch. 1.

Chap. VIII.
Sect. 7.

An assignee of the copyright of the assignment to him, &c., by deed, attested by two or more credible witnesses, is not liable to an action for copying, casting, or vending the same (x).

The conditions under which the copyright is acquired are almost identical with those required to be performed in order to obtain a copyright under the Engraving Acts. When a sculptor models or designs for himself and afterwards executes from such models a finished bust in marble or any other material, it is not sufficient for the sculptor in order to acquire the copyright therein to affix his name and the year when the finished copy from the model was executed; he must conform strictly to the letter of the Act, and therefore engrave on the model as well as on every cast or copy thereof his name and the day of the month when the model is first shown or otherwise published in his studio or elsewhere; and such date must never be altered.

Pleading.

The statement of claim should allege all the material facts which show that the right for an invasion of which the action is brought is actually vested in the plaintiff under the provisions of the Act, and in particular it must allege that the plaintiff caused his name with the date to be put upon all and every new and original sculpture, model, copy, or cast, or as the case may be, on every cast from nature before the same was put forth and published.

The defendant by his statement of defence must deny the allegations in the statement of claim (y). He may also allege that the plaintiff's right has expired before the commencement of the action, or that the right of action is barred by the lapse of six months after the discovery of the alleged offence before the action was brought (z), or that the defendant had purchased the right or property of the original sculpture or model (a).

(x) 54 Geo. III. c. 56, s. 4.

(z) See 54 Geo. III. c. 56, s. 5.

(y) Ord. XIX. 5; Appendix D.,
sect. VI.

(a) Ib. s. 4.

SECTION VIII.—COPYRIGHT IN DESIGNS.

COPYRIGHT in Designs depends upon the Patents, Designs and Trade Marks Acts, 1883 and 1886 (*b*). Chap. VIII.
Sect. 8.

When a design is registered, the registered proprietor of the design has, subject to the provisions of the Act, copyright in the design during five years from the date of registration (*c*).

“Design” for the purposes of the Act means any design applicable to any article of manufacture or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern or for the shape or configuration or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act (*d*).

Copyright means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered (*e*).

The proprietor of any new and original design (*f*), not previously published in the United Kingdom, may have his design registered (*g*), and is on registration entitled to have a certificate of registration (*h*). Registration.

To entitle a design to be registered, the design must be either substantially new or substantially original, having regard to the nature of the subject to which it is to be applied. A design is not a proper subject for registration unless there is a clearly marked and defined difference involving substantial novelty between that which is to be registered as a new design and that which has gone before (*i*). It is not necessary that there should be invention. Novelty in the idea of the design itself is not necessary; it is sufficient if there is novelty in the

(*b*) 46 & 47 Vict. c. 57, ss. 47— proprietor, 46 & 47 Vict. c. 57, s. 61.
61; 51 & 52 Vict. c. 50. (*g*) *Ib.* ss. 47, 48.

(*c*) 46 & 47 Vict. c. 57, s. 50.

(*h*) *Ib.* s. 49.

(*d*) 46 & 47 Vict. c. 57, s. 60.

(*i*) *Le May v. Welch*, 28 C. D.

(*e*) *Ib.*

24; *Re Rollason*, 14 R. P. C. 909.

(*f*) See as to who is the pro-

Chap. VIII.
Sect. 8.

application of the design to some article of manufacture (*k*). The mere combination of old materials in an old manner may be registered, if there be a new design. But to be a new design, the combination of old materials must constitute one design and must not be a mere multiplicity of old designs (*l*). Further, a previously known design may be registered if applied to quite different articles, and even a registered design may be registered by another person if applied to quite different articles of another class (*m*). A design is a proper subject for registration, though it has no artistic merit, and though it might have been the subject of a patent (*n*). A design may be registered for part of an article as well as for a complete article (*o*).

No person is entitled to the benefit of the statute unless the design has been registered before publication. If there has been publication of the design in the United Kingdom, it cannot be afterwards registered (*p*). If the public have become possessed of the invention by any means whatever, even, it seems, by breach of confidence, it cannot be registered (*q*). But the exhibition of a design at an industrial or international exhibition certified as such by the Board of Trade will not prevent or invalidate registration, provided certain conditions are complied with (*r*).

Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each article to be marked with the prescribed mark or with the prescribed word, or words, or figures denoting that the design is registered; and if he fails to do so, the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article (*s*).

(*k*) *Saunders v. Wiel*, 10 R. P. C. 29, doubting *Adams v. Clementson*, 12 C. D. 716.

(*l*) *Holdsworth v. Macrae*, L. R. 2 H. L. 380; *Lazarus v. Charles*, 18 Eq. 117; *Rivett v. Grimshaw*, 11 R. P. C. 351.

(*m*) *Re Clarke's Design*, (1896) 2 Ch. 38.

(*n*) *Walker & Co. v. Falkirk Iron Co.*, 4 R. P. C. 390.

(*o*) *Ib.*

(*p*) 46 & 47 Vict. c. 57, s. 47.

(*q*) 4 R. P. C. p. 416, *per* Fry, L. J.

(*r*) 46 & 47 Vict. c. 57, s. 57.

(*s*) 46 & 47 Vict. c. 57, s. 51; see *Wittman v. Oppenheimer*, 27 C. D.

But the proprietor is not deprived of protection because he places on the articles, besides the registered number, other numbers which ought not to be there (*t*).

During the existence of copyright in any design, no person may without the licence or written consent of the registered proprietor apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural, or partly artificial or partly natural. Nor may any person publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor (*u*). An injunction may be granted against the mere manufacture of articles to which a registered design is wrongfully applied, even where it is not intended to sell the articles till after the expiration of the copyright (*x*).

The registered proprietor of any design may bring an action for the recovery of any damages arising from the application of any such design or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication, sale or exposure for sale by any person of any article or substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application (*y*).

The right of action is given to the registered proprietor exclusively, and a licensee cannot sue (*z*), but an equitable assignment may be registered (*a*).

In an action for infringement it is generally advisable to

- 260; *Sarasin v. Hamel*, 32 Beav. G. & Sm. 496.
 151; *Heywood v. Potter*, 1 E. & B. (y) 46 & 47 Vict. c. 57, s. 59.
 439; *Fielding v. Hawley*, 48 L. T. See as to fraudulent imitation,
 639. *Barran v. Lomas*, 28 W. R. 973.
 (t) *Harper v. Wright*, (1896) 1 (z) *Woolley v. Broad*, (1892) 1 Q.
 Ch. 142. B. 806.
 (u) 46 & 47 Vict. c. 57, s. 58. (a) *Re Casey*, (1892) 1 Ch. 104.
 (x) *McCrae v. Holdsworth*, 2 De

Chap. VIII.
Sect. 8.

apply for an interlocutory injunction (b). On the hearing of such an application the Court will consider the balance of convenience and inconvenience of the parties (c); and where there is a considerable conflict of testimony the application will generally be ordered to stand to the hearing (d).

Ignorance of the registration of a design does not excuse a piracy of the right therein (e), though it may affect the question of costs (f).

Pleadings.

The statement of claim must allege that the plaintiff is the proprietor of the design registered, and that he has caused each article delivered for sale to be marked with the prescribed mark or word or figures denoting that the design is registered (g). There should also be an allegation that the design is new and original (h), and that it has been used in this country within six months of its registration or has not been used in any foreign country (i), and that the defendant has committed the alleged piracy without the plaintiff's licence or consent; and in cases where the defendant is charged with having sold or exposed for sale any article or any substance to which the design or any fraudulent imitation thereof has been applied, there must be an allegation that he did so knowing that the same has been so applied without the consent of the plaintiff (k).

The defendant may resist the action on the ground, (1) that the alleged acts of piracy were not done by him, or (2) that they do not constitute a piracy, or (3) that the plaintiff's design is invalid, or (4) that the copyright in the same no longer exists.

At the trial the articles alleged to be piracies should be produced in Court in order that they may be compared with the original design and the articles to which it has been attached

(b) 15 C. D. p. 196.

(c) *Grafton v. Watson*, 51 L. T. 141; *Knowles v. Bennett*, 12 B. P. C. 137.

(d) *Mitchell v. Henry*, 15 C. D. p. 195.

(e) *McCrae v. Holdsworth*, 2 De

G. & Sm. 497; *Mallett v. Howitt*, W. N. (1879) 107.

(f) *Post*, p. 327.

(g) *Ante*, p. 318.

(h) 46 & 47 Vict. c. 57, s. 47.

(i) *Ib.* s. 54.

(k) *Ante*, p. 319.

by the proprietor (*l*). The question of novelty must be determined by ocular comparison, and it is immaterial to consider whether there is any utility in the design (*m*).

Chap. VIII.
Sect. 9.

SECTION IX.—INTERNATIONAL COPYRIGHT.

THE International Copyright Acts, 1844 to 1886, empower the King, by order in Council, to direct that as regards literary and artistic works first published in a foreign country, the author shall have copyright therein during the time specified in the order not exceeding the period during which authors of the like works first published in England have copyright (*n*).

International
copyright.

The 19th clause of the International Copyright Act, 7 & 8 Vict. c. 12, which enacts that no author of any book or dramatic piece, which shall be first published out of the British dominions, shall have copyright therein, otherwise than under the provisions of the Act, applies to British subjects first publishing in a country with which no international convention exists (*o*). A British author who first publishes in a country with which a convention has been made under the Statute is entitled to protection. If no convention has been made with the country in which he first publishes, he cannot be protected (*p*). In the case of dramatic compositions, the public representation is a publication within the meaning of the Statute (*q*).

“Published” in sect. 11 of the Act of 1886 includes the case of exhibiting a painting; and the country where it is first published is the country of origin, so that compliance with the formalities of the law of that country gives the owner the right to sue here (*r*).

(*l*) *Sheriff v. Coates*, 1 R. & M. 159.

(*m*) *Hecla Foundry v. Walker*, 6 R. P. C. 554.

(*n*) 49 & 50 Vict. c. 33, Ord. in Council, 2 Dec. 1887, 1st Sch. Art. 11.

(*o*) *Boucicault v. Delafield*, 1 H. & M. 597.

(*p*) *Ib.*; *Boucicault v. Chatterton*, 5 C. D. 267.

(*q*) *Ib.*

(*r*) *Hanfstaengl v. American Tobacco Co.*, (1895) 1 Q. B. 347.

Chap. VIII.
Sect. 9.

The expression "literary and artistic work" means every book, print, lithograph, article of sculpture, dramatic piece, musical composition, painting, drawing, photograph and other work of literature and art, to which the Copyright Act or the International Copyright Acts, as the case requires, extend (s).

Translations.

Where a book being a book or dramatic piece is first produced in a foreign country to which an order under the International Copyright Acts apply the author or his lawful representatives shall for the period of ten years from the publication of the original work have the same right of preventing the production in or importation into the British dominions of any translation not authorised by him of such work as he has of preventing the production and importation of the original work (t).

The law relating to copyright applies to a lawfully produced translation of a work in like manner as if it were an original work (u).

If at the end of ten years he has not published an authorised translation he loses this right, but if he has published such a translation the right is co-existent with his copyright (x). The translation need not be absolutely literal; it is sufficient if it is substantially a translation (y).

Newspapers
and periodicals.

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical. This prohibition does not apply to articles of political discussions or to the reproduction of the news of the day or current topics (z).

(s) 49 & 50 Vict. c. 33, s. 11. See Ord. in Council, 2 Dec. 1887, 1st Sch. Art. IV.

(t) 49 & 50 Vict. c. 33, ss. 5, 9, Ord. in Council, 2 Dec. 1887, 1st Sch. Art. V.

(u) 49 & 50 Vict. c. 33, s. 5, sub-s. 3, Ord. in Council, 2 Dec. 1887, 1st

Sch. Art. VI.

(x) This seems to be the effect of the section.

(y) *Lauri v. Renad*, (1892) 3 Ch. 402.

(z) Ord. in Council, 2 Dec. 1887, 1st Sch. Art. VII.

The protection of the Acts applies to the public representation of dramatic or dramatico-musical works, whether such works be published or not. Authors of dramatic or dramatico-musical works or their lawful representatives are, during the existence of their exclusive right of translation, equally protected against the unauthorised public representation of translations of their works. The protection of the Acts applies equally to the public performance of unpublished musical works or of published works in which the author has expressly declared on the title page or commencement of the work that he forbids the public performance (a).

Chap. VIII.
Sect. 9.
Musical and
dramatic works.

The proviso in 15 & 16 Vict. c. 12, s. 6, permitting fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country does not apply to any dramatic pieces to which protection is extended by virtue of Order in Council, 2nd Dec. 1887 (b).

Unauthorised indirect appropriations of a literary or artistic work, of various kinds, such as adaptations, arrangements of music, &c., &c., are the illicit reproductions to which the convention applies, when they are only the reproduction of a particular work, in the same form or in another form, with non-essential alterations, additions, or abridgments so made as not to confer the character of a new original work (c).

The author of any literary or artistic work first produced before the date at which the Order in Council comes into operation has the same rights and remedies to which he is entitled under sect. 6 of the International Copyright Act, 1886 (d).

Act applies to
existing works.

Under the former law as to International Copyright the author of a literary or artistic work first published in a foreign country was not entitled to the benefit of the International Copyright Acts unless his work was duly registered in this country and copies of it had been duly delivered (e). But the

Registration not
required.

(a) Ib. Art. IX.

(b) 38 & 39 Vict. c. 12.

(c) Ord. in Council, 2 Dec. 1887,
1st Sch. Art. X.

(d) Ord. in Council, 2 Dec. 1887,

3; *Lauri v. Renad*, (1892) 3 Ch.
402.

(e) 7 & 8 Vict. c. 12, s. 6; *Fairlie
v. Boosey*, 4 App. Ca. 726.

Chap. VIII.
Sect. 9.

Act of 1886, s. 4, provides that the provisions of the International Copyright Acts as to registration and delivery of copies of works shall only apply so far as is provided by the Order in Council. The Order in Council contains no such provision, and therefore registration is not necessary to give a right to sue for infringement (*f*).

Remedy.

An English author seeking to prevent infringements of his copyright in foreign countries must apply to the foreign and not to the English courts (*g*).

The International Copyright Act, 1886, limits the duration of the term of copyright to that prescribed by the law of the country of origin of the proprietor. But when the right to sue in the country of origin is established the remedies are regulated by the law of the country in which the infringement takes place. Thus an injunction may be granted here, though such a remedy is unknown in the country of origin (*h*).

Who may sue.

In ordinary cases it will be sufficient in order to enable the author of a work protected by the convention to see that his name be indicated in the work in the accustomed manner. For anonymous or pseudo-anonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, the lawful representative of the anonymous or pseudo-anonymous author (*i*).

Evidence of
copyright.

The Court may when it is necessary require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished (*k*).

Importation of
copies.

Copies of books wherein copyright is subsisting printed in foreign countries other than those wherein the book was first published may not be imported (*l*). Where an English copyright is subsisting in a book first published in a foreign

(*f*) *Hunfstaengl v. American Tobacco Co.*, (1895) 1 Q. B. 347.

(*g*) *Morocco Bound v. Harris*, (1895) 1 Ch. 535.

(*h*) *Baschet v. London Illustrated, &c.*, (1900) 1 Ch. 73.

(*i*) Ord. in Council, 2 Dec. 1887, 1st Sch. Art. XI.

(*k*) 49 & 50 Vict. c. 33, s. 7. See as to application of the Act to Colonies, ib. s. 8 (2).

(*l*) 7 & 8 Viet. c. 12, s. 10.

country it is unlawful for any one without the consent of the proprietor of the English copyright to import into England for sale copies of the book published abroad though lawfully printed by the owner of the original copyright in the country where the book was first published (*n*).

Chap. VIII.
Sect. 10.

SECTION X.—ACCOUNT, COSTS, ETC.

WHERE an action for infringement of copyright is brought to a hearing and a perpetual injunction granted, the plaintiff is entitled to an account of profits as incidental to the relief by injunction (*n*).

If the account is small, it is usually waived (*o*), but when it is not waived, the Court grants it upon principles which have been thus stated by Wigram, V.-C., in *Colburn v. Simms* (*p*). "The Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them all to the party who has been injured. In doing that the Court may give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive work would have been sold, if the injury by the sale of the cheaper work had not been committed. The Court does not give anything more than the account" (*q*). The account is limited to the net profits actually made and the monies actually received by the wrongdoer (*r*). The

(*n*) *Pitts v. George*, (1896) 2 Ch. M. 247.

866. (*p*) 2 Ha. 560.

(*n*) *Hole v. Bradbury*, 12 C. D. (*q*) *Ib.*

899. (*r*) *Delfe v. Delamotte*, 3 K. & J.

(*o*) See *Fradella v. Weller*, 2 B. & 581.

Chap. VIII.
Sect. 10.

account may be ascertained from affidavits made by or on behalf of the defendants (s).

Delivery up of
pirated copies.

The delivery up of the pirated copies depends entirely upon statute. There is not any common law right on the subject (t). The 28rd section of the statute 5 & 6 Vict. c. 45, which gives the registered proprietor of copyright in literary matter the right to have all the unsold copies of a pirated book delivered up, does not give him any right to more than the usual account of the net profits of all the copies which may have been sold. He has no right to an account of the gross proceeds. To recover the unsold copies he must proceed at law (u). At law he is entitled to have all the unsold copies delivered up to him for his own use without making any compensation for the cost of production and publication (x). The Court, however, has power under its general jurisdiction to order that the copies unsold which have been printed in violation of the right of the plaintiff shall be delivered up to be destroyed (y).

In a case within the Copyright of Designs Act, 5 & 6 Vict. c. 100, Knight-Bruce, L. J., made an order for the delivery up to the plaintiff, for the purpose of being destroyed, of all drawings and cards used by the defendant in applying his design, and also of all articles manufactured by the defendants to which the plaintiff's design had been applied (z).

Discovery.

The defendant must, if required to do so for the purposes of the account or the inquiry as to damages, set out the number of copies containing pirated matter which have been sold by him (a). The plaintiff is entitled to continue the suit until the discovery be given (b).

(s) *Pike v. Nicholas*, 20 L. T. 909;
Kelly v. Hodge, 29 L. T. 387.

(t) *Colburn v. Simms*, 2 Ha. 560.

(u) *Delfe v. Delamotte*, 3 K. & J.
581.

(x) *Ib.*; *Hole v. Bradbury*, 12 C.
D. 903; *Isaacs v. Fiddeman*, 49 L.
J. Ch. 412.

(y) *Delfe v. Delamotte*, 3 K. & J.
581; *Prince Albert v. Strange*, 2

De G. & Sm. 652; *Kelly v. Hodge*, 1
Set. 680; *Hole v. Bradbury*, 12 C.
D. 903.

(z) *Macrae v. Holdsworth*, 2 De
G. & S. 497.

(a) *Stevens v. Brett*, 12 W. R.
572.

(b) See *Colburn v. Simms*, 2 Ha.
543; *Kelly v. Hooper*, 1 Y. & C. C. C.
197.

The principle of assessing damages in all cases of literary piracy is that the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay to the plaintiff the profit which he would have received from the sale of so many additional copies (c).

Chap. VIII.
Sect. 10.
Damages.

A man whose copyright is invaded is *primâ facie* entitled to an injunction with costs (d), but the Court will not as a matter of course order the defendant to pay the costs (e). The plaintiff is not bound to give notice to the defendant before serving him with the writ in the action: and it is immaterial that the defendant may have innocently infringed the copyright (f). If the defendant do not, after injunction obtained, offer to pay the costs, and to give the plaintiff all the other relief to which he is entitled, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit, although at the hearing he may waive his right to the other relief (g). But if the defendant offers to submit to the injunction with costs, and to give the plaintiff all the relief to which he is entitled, the Court will not give the plaintiff his costs of the subsequent prosecution of the suit to the hearing (h).

The "full costs" provided by the statute 5 & 6 Vict. c. 45, s. 26, are only the ordinary party and party costs (i). But a plaintiff is entitled to High Court costs, though only forty shillings is recovered (k).

- | | |
|---|--|
| (c) <i>Pike v. Nicholas</i> , 5 Ch. 260, | C. D. 260. |
| n., per James, L. J. | (g) <i>Ante</i> , p. 273. |
| (d) <i>Cooper v. Whittingham</i> , 15 | (h) <i>Ante</i> , p. 273. |
| C. D. 507; <i>ante</i> , p. 272. | (i) <i>Avery v. Wood</i> , (1891) 3 Ch. |
| (e) <i>Waller v. Steinkopff</i> , (1892) 3 | 115. |
| Ch. 489; <i>Baschet v. London Illustrated</i> , &c., (1900) 1 Ch. 73. | (k) <i>Reeve v. Gibson</i> , (1891) 1 Q. B. 652. |
| (f) <i>Wittman v. Oppenheim</i> , 27 | |

CHAPTER IX.

INJUNCTIONS TO RESTRAIN THE PIRACY OF TRADE MARKS AND TRADE NAMES AND THE PASSING OFF BY A MAN OF HIS GOODS AS THE GOODS OF ANOTHER.

Chap. IX. THE jurisdiction of the Court in restraining by interlocutory
Jurisdiction. injunction the piracy of trade marks or trade names and the
passing off by one man of his own goods as being the goods of
another is in aid of the legal right and is founded on the equity
of protecting property from irreparable damage. The principles
upon which the Court interferes in such cases are the same as
those upon which it acts in other cases in protecting legal
rights to property from violation (a).

Trade mark. A trade mark is a particular mark, brand or symbol used by
a trader or manufacturer for the purpose of denoting that the
article to which it is affixed is sold or manufactured by him or
by his authority or that he carries on his business at a par-
ticular place. Where such a mark, brand or symbol comes by
use to be recognised in trade as the mark of the goods of a
particular trader or manufacturer so that thereby persons
purchasing goods of that description know them to be of his
manufacture, it becomes to that extent the exclusive property
of that particular trader or manufacturer, and no other trader
or manufacturer has the right to brand the same or a similar
mark on goods of the same description. By doing so he
would be substantially representing the goods to be of the
manufacture of the trader who had previously adopted the
mark or brand in question, and so would or might deprive
him of the profit he might have made by the sale of the goods
which the purchaser intended to buy. The law considers this

(a) *Leather Cloth Co. v. American v. Henry*, 15 C. D. 191.
Cloth Co., 4 D. J. & S. 137; *Mitchell*

to be a wrong towards the person whose mark is thus assumed for which he has a right of action (*b*). The right, however, to the exclusive use of a trade mark is limited to its use in connection with a particular class of goods. Apart from the particular use or application there is no right to the use of the symbol. The use of the same mark or symbol in connection with goods of a totally different character is not an infringement of the right (*c*). Nor can the right to a trade mark be severed from the article indicated by it (*d*), nor from the goodwill of the business in which it has been used (*e*).

Before the Registration Act of 1875 the right to a trade mark could only be acquired by user. The right was by the general principles of commercial law established as soon as the particular article to which the mark or symbol was applied obtained acceptance and reputation in the market, and the mark or symbol gained currency in the market as an indication of superior value or some other circumstance that rendered the article to which it was applied acceptable to a purchaser (*f*). But under that Act the registration of a trade mark is deemed equivalent to the public use of such mark (*g*). The registration of a person as proprietor of a trade mark is *prima facie* evidence of his right to the exclusive use of the trade mark, and is, after the expiration of five years from the date of registration, conclusive evidence of his right to the exclusive use of the trade mark subject to the provisions of the Act (*h*).

Mode of acquiring the right to a trade mark.

A trade mark must be registered before any action to prevent its infringement can be brought (*i*). The owner,

Trade mark must be registered.

(*b*) *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. 538; *Glenny v. Smith*, 2 Dr. & Sm. 476; *Seizo v. Provezende*, 1 Ch. 192; *Somerville v. Schembri*, 12 App. Ca. 454.

(*c*) *Edelsten v. Edelsten*, 1 D. J. & S. 185; *Leather Cloth Co. v. American Cloth Co.*, 4 D. J. & S. 137; *Somerville v. Schembri*, 12 App. Ca. 457.

(*d*) *Cotton v. Gillard*, 44 L. J. Ch. 90; *Macandrew v. Bassett*, 4 D. J. & S. 384.

(*e*) 46 & 47 Vict. c. 57, s. 70.

(*f*) *Macandrew v. Bassett*, 4 D. J. & S. 380; *Somerville v. Schembri*, 12 App. Ca. 457.

(*g*) *Re Hudson's Executors*, 32 C. D. 311.

(*h*) 46 & 47 Vict. c. 57, s. 76; see *Mitchell v. Henry*, 15 C. D. 193; *Orr Ewing v. Registrar of Trade Marks*, 4 App. Ca. 495; *Re Edwards' Trade Marks*, 30 C. D. 455, *post*, p. 331.

(*i*) 46 & 47 Vict. c. 57, s. 77; see *Orr Ewing v. Registrar of Trade*

Chap. IX.

indeed, of a trade mark acquired by user cannot bring an action with respect to it prior to registration (*k*). The section (*l*) however has no application to actions for passing off. The principles on which the Court acts in preventing a man from passing off his goods as those of another person have not been altered by the Trade Marks Registration Act (*m*). Where the alleged infringement consists of using not the exact thing upon the register, but something similar to it, the Court must in considering whether or not there has been an infringement proceed on the old principle that a man must not pass off his goods as the goods of another (*n*).

Registration of trade mark.

A trade mark must for the purposes of the Trade Marks Act, 1888, consist of or contain at least one of the following essential particulars: (a) a name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or (b) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or (c) a distinctive device, mark, brand, heading, label, ticket (*o*), or an invented word or invented words (*p*), or a word or words having no reference to the character or quality of the goods and not being a geographical name.

There may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or any of them; but the applicant for registration must disclaim any right to the exclusive use of the added matter. He need not, however, disclaim his own name or its foreign equivalent or his place of business, but no entry of any such name shall affect the right of any

Marks, 4 App. Ca. 495, 498; *Good-fellow v. Prince*, 35 C. D. 9, *post*, p. 332.

(*k*) *Re Hudson's Executors*, 32 C. D. 320.

(*l*) Section 77 of 46 & 47 Vict. c. 57.

(*m*) *Mitchell v. Henry*, 15 C. D. 190, *per James, L. J.*; *Jay v. Ladler*, 40 C. D. 649; *Montgomery v.*

Thompson, (1891) A. C. 217.

(*n*) *Re Edwards' Trade Mark*, 30 C. D. 470; *Re Lyndon*, 32 C. D. 109.

(*o*) See *Re Wood's Trade Mark*, 32 C. D. 247; *Re James' Trade Mark*, 33 C. D. 393; *Re Hanson*, 37 C. D. 113.

(*p*) *Eastman Photographic Co. v. Comptroller-General*, (1898) A. C. 571.

owner of the same name to use that name or its foreign equivalent (q). A single letter (r) or a single word or combination of letters cannot be registered as a trade mark unless it was used as a trade mark before August, 1875 (s).

Chap. IX.

If a trade mark has been used by more than three persons before the date of registration, it is common to the trade and no one can register it (t); but where a trade mark has been used by not more than three different persons as a trade mark prior to the passing of the Act of 1875, each of them is entitled to registration, if it appear that the parties have used the mark independently and each of them claims *bonâ fide*. Old marks may be registered up to the number of three by different persons in respect of the same goods, even if identical (u).

Three old marks may be registered.

Except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, there may not be registered in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods (x). Nor shall there be registered with respect to the same goods or description of goods a trade mark having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive (y). Nor shall it be lawful to register as part of or in combination with a trade mark any words the use of which would by reason of their being calculated to deceive or otherwise be deemed disentitled to protection in a Court of Justice or any scandalous design (z).

Restrictions on registration.

(q) 51 & 52 Vict. c. 50, s. 10; see *Re Palmer's Trade Mark*, 24 C. D. 514; *Orr Ewing v. Registrar of Trade Marks*, 4 App. Ca. 484, 496; *Re Leonard and Ellis' Trade Mark*, 26 C. D. 288; *Re Wood's Trade Mark*, 32 C. D. 247.

(r) *Re Mitchell*, 7 C. D. 40.

(s) *Ex parte Stephens*, 3 C. D. 660; *Re Leonard and Ellis' Trade Mark*, 26 C. D. 289.

(t) 46 & 47 Vict. c. 57, s. 74, sub-s. 3.

(u) *Mouson v. Boehm*, 26 C. D. 398; *Re Wragg's Trade Mark*, 29 C. D. 551; *Re Schmidt's Trade Mark*, 35 C. D. 162.

(x) 46 & 47 Vict. c. 57, s. 72.

(y) 46 & 47 Vict. c. 57, s. 72; 51 & 52 Vict. c. 50, s. 14; *Australian Wine Importers' case*, 41 C. D. 278.

(z) 46 & 47 Vict. c. 57, s. 73; see *Re Horsburgh*, 53 L. J. Ch. 237, n.; *Re Anderson's Trade Mark*, 26 C. D. 415; *Re Wood's Trade Mark*, 32 C. D. 247.

Chap. IX.

A trade mark must be registered for particular goods or classes of goods (a), and it is restricted to the goods in connection with which it is going to be used (b). Registration cannot be made in respect of goods in which the applicant does not deal or intend to deal (c).

Rectification of register.

The Court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person or of any other particulars from any register kept under the Act or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry as the Court thinks fit (d). It would be outside the scope of this work to cite the numerous cases under this section. It may, however, be stated that the application is made by motion or summons and cannot be made by counterclaim in the action (e). It may also be added that the fact that a trade mark has been on the register for more than five years before application is made to remove it does not protect the device from removal if the registration was unlawful. Any person who feels himself aggrieved by any entry made in the register without sufficient cause is not precluded by the expiration of five years from the date of such registration from showing that the mark ought not to have been registered (f).

Name.

The principle which applies to the case of a man selling his goods as the goods of another applies to the case of a man using the name of another for the purpose of reaping the benefit of the reputation which that other has already acquired in the market. A man has a right to set up a shop anywhere for the sale of goods under his own name, although another may have been long selling the same class of goods under the same name, and although the goods, as associated with his

(a) 46 & 47 Vict. c. 57, s. 65.

(b) *Re Edwards' Trade Mark*, 30 C. D. 470; *Hargreaves v. Freeman*, (1891) 3 Ch. 39.(c) *Batt v. Dunnett*, (1899) A. C. 428.(d) 46 & 47 Vict. c. 57, s. 90; 51 & 52 Vict. c. 50, s. 23; see *Orr**Ewing v. Registrar of Trade Marks*, 4 App. Ca. 497; *Riviere's Trade Mark*, 26 C. D. 48.(e) *Pinto v. Badman*, 8 R. P. C. 181.(f) *Re Edwards' Trade Mark*, 30 C. D. 479; *Re Wood's Trade Mark*, 32 C. D. 247.

name, may have acquired a reputation in the market. The mere user by a man of his own name is of itself no evidence of fraud, but there may be other elements in the case showing that the name has been fraudulently used for the purpose of leading the public to believe that they are buying goods manufactured by another man, and so reaping the benefit of the reputation which another has already acquired. It is in each case a matter of evidence whether or not the user of the name has been fraudulent (*g*). If a man changes his name and assumes another, and sets up a business in the neighbourhood of a person who has long carried on the same business under the name which he has assumed, fraud will be, as a general rule, presumed (*h*).

But even in the absence of fraud, a person cannot trade ^{Name.} under his own name, in such a way as to deceive the public. There is no difference in principle between the case of a man's own name and that of any other descriptive word (*i*). Where it can be proved that a personal name has become so identified by use in a well-known business with a particular trade as to be necessarily deceptive when used without qualification by any one else in the same trade, another trader may be restrained from using it "without distinguishing, &c.," although it is his own name (*k*).

Apart from a business of some kind, no exclusive right can be acquired in the name of a house, any more than in the name of a person; and no right of action arises from the annoyance occasioned by a person re-naming his residence after the neighbouring residence of another householder (*l*). Upon the same principle the Court refused to restrain a man from selling pills which he falsely represented to be the pills of the plaintiff, an

(*g*) *Rodgers v. Nowill*, 6 Ha. 325; N. S. 573.

Holloway v. Holloway, 13 Beav. 209;

Burgess v. Burgess, 3 D. M. & G.

896; *Churton v. Douglas*, John. 174.

(*h*) *Burgess v. Burgess*, 3 D. M.

& G. 896; *Massam v. Thorley's*

Cattle Food Co., 14 C. D. 748;

Fulwood v. Fulwood, W. N. (1873)

93, 185; *Dence v. Mason*, 41 L. T.

(*i*) *Jamieson v. Jamieson*, 15 R.

P. C. 169; *Valentine v. Valentine*,

17 R. P. C. 673; *Chivers v. Chivers*,

17 R. P. C. 420.

(*k*) *Cush v. Cash*, W. N. (1902)

32; 86 L. T. 211

(*l*) *Day v. Brownrigg*, 10 C. D.

294.

Chap. IX.

eminent physician, on the ground that the latter carried on no business in pill-making (*m*). Relief, however, in such a case would probably now be granted (*n*), but not, it seems, on an interlocutory application (*o*).

Trade name or
partnership
style.

The same principles which apply to the right to use a name are also applicable to the use of a trade name or partnership firm or style. If the use of a partnership firm or style be *bonâ fide*, the Court will not interpose; but if there be evidence to show that the name has been taken for the purpose of having the benefit of the reputation which another has acquired in the market, there is a case of fraud (*p*).

Where a man has established a trade and carries it on under a given name, there is fraud if another trader assumes the same name or the same name with a slight variation in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given the reputation to the name (*q*). But a man is not debarred from using as a trade name a style which is descriptive of his business, so long as he does not assume the name for the purpose of passing off his goods as being the goods of another man, and there is no strong probability of deception. A man, for instance, who sold coals at a guinea a ton was held entitled to call his shop a guinea coal company, although another trader had for some time previously used that name in the designation of his business, so long as he did not use the name with the intention of deceiving the public (*r*).

Trade name of a
company.

A company can by injunction restrain the registration of an intended company, intended to carry on a similar business under a name so like its own as to be calculated to deceive the public (*s*), and if such a company has been

(*m*) *Clark v. Freeman*, 11 Beav. 112.

(*n*) *Dockrell v. Dougall*, 80 L. T. 556.

(*o*) *Williams v. Hodge*, 4 T. L. R. 175.

(*p*) *Croft v. Day*, 7 Beav. 84.

(*q*) *Lee v. Haley*, 5 Ch. 161; *Hoby v. Grosvenor Library*, 28 W. R. 386;

Boulnois v. Leake, 13 C. D. 514, n.

(*r*) *Lee v. Haley*, 5 Ch. 155; *Civil Service Supply Association v. Dean*, 13 C. D. 512; and see *Borthwick v. Evening Post*, 37 C. D. 449.

(*s*) *Tussaud v. Tussaud*, 44 C. D. 678.

registered, to restrain it from carrying on business under such name (t). Chap. IX.

The question is simply whether the name adopted by the one company for a business of the same kind is so like the name of the plaintiff company, which they have for some time used as a trade name, as in fact to enable the defendant company to appropriate a material part of the business of the plaintiff company (u). It must however be shown that there is a reasonable probability of damage to the plaintiff company's business; mere similarity of name is not alone sufficient (x).

A man who has been in the employment of a firm of reputation has a right on setting up a business of a similar character, to inform the public in any way he thinks fit that he has been in such employment; but in so doing he must take especial care that it be not done in such a way as to lead to the belief that he is carrying on the business or a branch of the business of the firm whose name he uses (y), for a trader will be restrained from falsely holding himself out as being in business with another trader, or from issuing circulars tending to lead the public to suppose that another trader has retired from business and that he has succeeded to the business (z). Trade name.

Where a name or word was originally or has become descriptive of an article, it cannot be protected as a trade name. If a person who invents a process for making a new article invents at the same time a new name for describing such article and the article comes to be known in the market by that name only, the right to the use of the word or name is *publici juris*. Where, for example, the inventor of a new substance has given it a name and, having taken out a patent for the invention, has Trade name of article.

(t) *Manchester Brewery v. North Cheshire, &c.*, (1898) 1 Ch. 539.

(u) *Hendriks v. Montagu*, 17 C. D. 638, per James, L. J.; *Guardian Fire and Life Insurance Co. v. Guardian and General Insurance Co.*, 50 L. J. Ch. 253; *Accidental Insurance Co. v. Accidental Disease, &c., Co.*, 54 L. J. Ch. 104.

(x) *General Reversionary and In-*

vestment Co. v. General Reversionary Co., 1 Meg. 65.

(y) *Glenny v. Smith*, 2 Dr. & Sm. 476; *Hookham v. Pottage*, 8 Ch. 95.

(z) *Harper v. Pearson*, 3 L. T. 547; *Witt v. Corcoran*, 2 C. D. 69; *Massam v. Thorley's Food for Cattle Co.*, 14 C. D. 748; *Dence v. Mason*, 41 L. T. 573; *Melachrino v. M.*, 4 R. P. C. 215.

Chap. IX.

during the continuance of the patent alone made and sold the substance by that name, he is not entitled to the exclusive use of the name after the patent has expired (a). A rival trader who makes the article is at liberty to describe and advertise it in his circulars and price-lists by the name by which it is properly known in the trade, provided he does so honestly and in such a manner as not to induce a purchaser to believe that he is buying goods made by the original trader who invented the name (b).

Trade name of
article.

A trade name may, however, be so appropriated by user as to come to mean the goods of a particular person, though it is not and never was impressed on the goods or the packages in which they are contained so as to be a trade mark properly so called or within the Statute. Where it is established that such a trade name bears that meaning, the use of that name or of one so nearly resembling it as to be likely to deceive as applicable to goods, not the plaintiff's, may be the means of passing off those goods as and for the plaintiff's just as much as the use of a trade mark (c). But where a name or word was originally or has become descriptive of the article to which it is attached, so that while indicating what the article is, it does not connect that article with any particular manufacturer, and there has been no such appropriation by user or reputation as to cause that word to mean in the market the goods of any particular manufacturer, the word cannot be protected as a trade name (d).

A manufacturer of a patented article may, however, have a trade mark not descriptive of the patented article, so as to be entitled to the exclusive use of that mark after the patent has

(a) *Linoleum Manufacturing Co. v. Nairn*, 7 C. D. 834; *Re Ralph*, 25 C. D. 194; *Re Leonard and Ellis's Trade Mark*, 26 C. D. 303; *Native Guano Co. v. Seavage Manure Co.*, 8 R. P. C. 125.

Leonard and Ellis's Trade Mark, 26 C. D. 289.

(b) *Ford v. Foster*, 7 Ch. 628; *Thorley's Food for Cattle Co. v. Massam*, 14 C. D. 748; *Re Palmer's Trade Mark*, 24 C. D. 521; *Re*

(c) *Singer Manufacturing Co. v. Loog*, 8 App. Ca. 32, per Lord Blackburn.

(d) *Schove v. Schminke*, 33 C. D. 547; *Borthwick v. Evening Post*, 37 C. D. 449; *Goodfellow v. Prince*, 35 C. D. 19; *Re Arbenz*, ib. 248.

expired; for instance, if he had impressed on the patented article a griffin or some other device (*e*).

The rule that when an article has acquired a name by which it is known in the market a manufacturer or trader may make and describe it by such name, applies of course only to cases where the inventor of the name is not possessed of a patent, or where, if he has possessed a patent, that patent has expired. If any one during the existence of a patent applies the name which the patentee has given to an article, not an infringement of the patent, he will be restrained by injunction, on the ground of the false representation that what he was selling was the patented article (*f*).

A trade mark cannot be assigned or devolve in gross; an assignment therefore is inoperative if the assignor has no goodwill to assign (*g*). Upon the sale of a business the right to both trade marks and trade names used in the business passes with the goodwill of the business to the successors of the firm that originally established them, without any express mention being made of them in the deed of assignment (*h*), unless a contrary intention appears (*i*).

A trade mark, when registered, can be assigned and transferred only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and is determinable with that goodwill (*k*). If the trade mark which has been assigned be in respect of an entire class of articles but the articles dealt with in the business which has been assigned form part only of the class, the assignee is not entitled to the exclusive user of the trade mark, but only to the user of it for the particular class of articles in connection with which it has been actually used (*l*).

- | | |
|--|---|
| <p>(<i>e</i>) <i>Re Palmer's Trade Mark</i>, 24 C. D. 521, <i>per</i> Lindley, L. J. See <i>Re Hayward's Trade Mark</i>, 54 L. J. Ch. 1003.</p> <p>(<i>f</i>) <i>Re Palmer's Trade Mark</i>, 24 C. D. 520, <i>per</i> Cotton, L. J.</p> <p>(<i>g</i>) See <i>Harness' Trade Mark</i>, 17 R. P. C. 40.</p> <p>(<i>h</i>) <i>Bury v. Bedford</i>, 4 D. J. & S.</p> | <p>372; <i>Shipwright v. Clements</i>, 19 W. R. 599.</p> <p>(<i>i</i>) <i>Rogers' Trade Mark</i>, 12 R. P. C. 149.</p> <p>(<i>k</i>) 46 & 47 Vict. c. 57, s. 70. See <i>Re Welcome's Trade Mark</i>, 32 C. D. 213.</p> <p>(<i>l</i>) <i>Re Edward's Trade Mark</i>, 30 C. D. 455.</p> |
|--|---|

Chap. IX.

Right to trade
name on assign-
ment of good-
will of business.

A man who has assigned the goodwill of a business may, unless precluded by covenant, set up the same business in the immediate neighbourhood, and may publish or advertise the fact of his having done so, but he may not trade under the old name, or solicit his old customers (*m*); and he has no right to use the trade marks which were the marks of that business (*n*), or by the use of the name or title of the firm to represent himself as carrying on the business which he has sold (*o*).

So if the trustee in bankruptcy of a trader sells the goodwill and trade marks of the bankrupt's business, the bankrupt has no right to continue to use the marks (*p*) or to represent that he is still carrying on the business, but he is not a grantor so as to be bound by the rule not to solicit customers as laid down in *Trego v. Hunt* (*q*).

The purchaser of a business though he is entitled in the absence of any special contract in the deed of assignment, to the use of the trade name of the business (*r*), must not use it in such a way as to lead ordinary persons to believe that the vendor is still carrying on the business (*s*).

Rights of partner
in trade marks.

Upon the formation of a partnership firm, a trade mark, to which one of the partners may be entitled, becomes, in the absence of any stipulation to the contrary, part of the partnership property (*t*). So also where a new partner comes into the partnership firm, amongst other rights which he purchases by coming into the firm is the right to use the trade name or trade marks belonging to the firm (*u*).

(*m*) *Vernon v. Hullam*, 34 C. D. 748; *Trego v. Hunt*, (1896) A. C. 7; *Jennings v. Jennings*, (1898) 1 Ch. 378.

(*n*) *Bury v. Bedford*, 4 D. J. & S. 373; *Shipwright v. Clements*, 19 W. R. 599.

(*o*) *Churton v. Douglas*, John, 174; *Hudson v. Osborne*, 39 L. J. Ch. 79.

(*p*) *Hudson v. Osborne*, 39 L. J. Ch. 79; *Hammond v. Brunner*, 9 B. P. C. 301.

(*q*) *Walker v. Mottram*, 19 C. D. 355.

(*r*) *Levy v. Walker*, 10 C. D. 448, per James, L. J.

(*s*) *Chatteris v. Isaacson*, 56 L. T. 177; cf. *Townsend v. Jarmar*, (1900) 2 Ch. 698.

(*t*) *Bury v. Bedford*, 4 D. J. & S. 374.

(*u*) *Singer Manufacturing Co. v. Wilson*, 2 C. D. 455, per Mellish, L. J.

The right to the use of a particular designation or partnership style passes, on the death of a partner, to the surviving partners or partner (*x*). On the death of a surviving partner, it passes to his personal representatives (*y*). On the dissolution of a partnership, in the absence of special agreement, the trade marks of the firm are part of its assets and are saleable as such with the goodwill (*z*); but it seems that each of the partners is at liberty to make use of the trade name of the firm and of its trade marks, provided he can and does do so in such a way as to avoid deceiving the public or casting any risk or liability upon his late partners (*a*).

A publisher or author has either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade mark, and may like a trader claim the protection of the Court against such a use or imitation of the name, marks, or designation, as is likely in the opinion of the Court to be a cause of damage to him in respect of that property; but there is no copyright in such titles (*b*). So also the proprietor of a newspaper has a right to prevent any other person from adopting the same name for any other similar publication (*c*).

But a publisher or newspaper proprietor who comes to the Court for an injunction to restrain any other person from taking the same name or title for any similar publication must be able to establish satisfactorily by distinct evidence that such name or title has come by general acceptance and reputation in the market to denote exclusively the work or newspaper published by him, so that purchasers when they buy the

(*x*) *Webster v. Webster*, 3 Sw. Ch. 551.

490 n.; *Lewis v. Langdon*, 7 Sim. 421.

(*y*) *Hine v. Lurt*, 10 Jur. 107. See *Dent v. Turpin*, 2 J. & H. 139.

(*z*) *Hall v. Barrows*, 4 D. J. & S. 150.

(*a*) *Ib.*; *Hookham v. Pottage*, 8 Ch. 91; *Thynne v. Shove*, 45 C. D. 577; *Burchell v. Wilde*, (1900) 1

(*b*) *Lord Byron v. Johnstone*, 2 Mer. 29; *Spottiswoode v. Clark*, 2 Ph. 154; *Chappell v. Davidson*, 8 D. M. & G. 1; *Maxwell v. Hogg*, 2 Ch. 307; *Dicks v. Yates*, 18 C. D. 85.

(*c*) *Kelly v. Hutton*, 3 Ch. 708; *Walter v. Emmott*, 54 L. J. Ch. 1059, W. N. (1885) 156.

Chap. IX.

articles or publication under that name or title believe they are buying the plaintiff's publication (*d*). It is not always easy to define the exact moment at which the reputation is acquired, but unless it has been acquired, it cannot be said that any exclusive right to the use of the name has been acquired (*e*).

Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must show not only that the assumption of the name is calculated to deceive the public, but also that there is a probability of the plaintiff being injured thereby (*f*).

Rights of an author or publisher in the title of his work.

A man has a full right to publish a similar work under the same title as that of another, if the title is a mere hackneyed phrase long in common use (*g*), or if he represents his work as distinct and original; but he may not without authority advertise his own work as the continuation of another or as being in connection with another (*h*).

A man cannot by advertising his intention of publishing a periodical under a certain name and making preparations for issuing it acquire a right to the exclusive use of the name, the periodical not having appeared before the bringing of the action (*i*).

The name of the editor is not a necessary part of the title of a journal. In the absence of any special contract to that effect, the Court will not restrain the owners of a journal from publishing it without the name of the editor (*k*). Nor on the other hand will the Court restrain a publisher from publishing a book in a mutilated form nor from representing that the plaintiff is the author simply because it might injure the author's reputation (*l*).

(*d*) *Kelly v. Byles*, 13 C. D. 682;
Schore v. Schminker, 33 C. D. 546;
Licensed Victuallers' Newspaper Co.
v. Bingham, 38 C. D. 139 (C.A.).

(*e*) *Licensed Victuallers' Newspaper Co. v. Bingham*, 38 C. D. 139 (C.A.).

(*f*) *Borthwick v. Evening Post*, 37 C. D. 449.

(*g*) *Dicks v. Yates*, 18 C. D. 85.

(*h*) *Hogg v. Kirby*, 8 Ves. 215;
Borthwick v. Evening Post, 37 C. D. 449.

(*i*) *Maxwell v. Hogg*, 2 Ch. 307.

(*k*) *Crookes v. Petter*, 6 Jur. N. S. 1131.

(*l*) *Lee v. Gibbings*, 67 L. T. 263.

The right to a trade mark may be lost by abandonment, but to constitute an abandonment an intention to abandon must be shown. Mere non-user of a trade mark for a period of five years is not sufficient to constitute abandonment (*m*). Chap. IX.
Abandonment
of trade mark.

The plaintiff must be owner of the trade mark and (subject to concurrent rights, if any) must prove that he is entitled to its exclusive use (*n*). An action to restrain the infringement of a trade mark with the usual claim for account of profits or damages being an action brought in respect of injury to the property of the owner of the trade mark, it may be continued after his death by his personal representatives (*o*). Who may sue.

It has been held that when a trade mark has been properly registered, the assignee of the registered proprietor can bring an action to prevent infringement without having registered the assignment (*p*). But this decision seems in conflict with a later case (*q*).

It would seem that the plaintiff must be using or intending to use the mark or name. A man who does not intend to carry on business under a particular name cannot interfere with its being used by another. Accordingly, a mortgagee of the goodwill of a business including the right to use the name but who had not used, and did not intend to use such name, was held not entitled to restrain persons claiming under the mortgagor from using it (*r*).

Where two or more persons are tenants in common in a trade mark, each of them has a right to sue alone in respect of the wrong done to himself (*s*), and several plaintiffs so entitled may join in one action, although their interests are distinct and separate (*t*).

(*m*) *Mouson v. Boehm*, 26 C. D. 398. *Comp. Re Rulph*, 25 C. D. 198; *Daniel v. Whitehouse*, (1898) 1 Ch. 685.

(*n*) *Robinson v. Finlay*, 9 C. D. 487.

(*o*) *Oakey v. Dalton*, 35 C. D. 700.

(*p*) *Ihlee v. Henshaw*, 31 C. D. 323.

(*q*) *Magnolia Co. v. Atlas Co.*, 14 R. P. C. 389.

(*r*) *Beazley v. Soares*, 22 C. D. 660.

(*s*) *Dent v. Turpin*, 2 J. & H. 139; *Batty v. Hill*, 1 H. & M. 270.

(*t*) *Magnolia Co. v. Atlas Co.*, 14 R. P. C. 389; *Universities of Oxford and Cambridge v. Gill*, (1899) 1 Ch. 55.

Chap. IX.

The owner of a trade mark and his agent cannot sue jointly, although the name of the agent appears on the trade mark (*u*).

A foreign manufacturer may bring an action to restrain the illegal user in this country of his trade mark and also for damages and an account (*x*). An action may also be brought in this country to restrain the export to a foreign port of goods fraudulently impressed with the plaintiff's mark (*y*). The Registration Acts make the registration of a trade mark by a foreigner a condition precedent to his right to sue (*z*).

A foreign sovereign or state may, like an individual, have an injunction to restrain the undue or unauthorised use of his or its name (*a*).

A mere importer has no title to sue for infringement of the trade marks of the consignor or producer (*b*). Nor has an exclusive purchaser of marked goods consigned to a particular district (*c*).

Who may be
sued.

An action for an injunction may be brought against an agent (*d*) or against a person employed in effecting only a part of the transaction, such as a person employed to engrave or print spurious labels or marks (*e*), or against an innocent person, such as a carrier (*f*), a shipowner (*g*), or a wharfinger who may have temporary possession of the articles impressed with a spurious trade mark (*h*), but a mere servant should not it seems be added as a defendant (*i*). A man who at the desire of another imposes upon goods a trade mark which

(*u*) *Delondre v. Shaw*, 2 Sim. 237.

(*x*) *Siebert v. Findlater*, 7 C. D. 801; *Johnston v. Orr Ewing*, 7 App. Ca. 219.

(*y*) *Johnston v. Orr Ewing*, *ib.*

(*z*) *Goodfellow v. Prince*, 35 C. D. 9.

(*a*) *Emperor of Austria v. Day*, 3 D. F. & J. 215, *per* Turner, L. J.

(*b*) *Hirsch v. Jonas*, 3 C. D. 584.

(*c*) *Richards v. Butcher*, 7 R. P. C. 288.

(*d*) *Upman v. Elkan*, 7 Ch. 132.

(*e*) *Guinness v. Ulmer*, 10 L. T. O. S. 127.

(*f*) *Upman v. Elkan*, 7 Ch. 150; *Apollinaris Co. v. Wilson*, 31 C. D. 633.

(*g*) *Orr Ewing v. Johnston*, 13 C. D. 435.

(*h*) *Moet v. Pickering*, 8 C. D. 372. *Comp. Nobel's Explosive Co. v. Jones*, 17 C. D. 742, 8 App. Ca. 5.

(*i*) *Daniel v. Whitehouse*, 16 R. P. C. 77.

belongs to a third party may be made a party to the action along with his principal (*k*). Chap. IX.

An innocent partner who has repudiated the wrongful act of his co-partner is not, it seems, liable to be sued (*l*).

An agent for a manufacturer who has been deprived of his agency may be made defendant to an action to restrain him from representing himself as being in the same kind of relation to the manufacturer as he was in before (*m*).

The statement of claim must allege all the material facts Pleading. necessary to show that the right to maintain the action is vested in the plaintiff (*n*). The form in Appendix C. s. vi. (8) should be used when such form is applicable and sufficient (*o*). The statement of claim should allege in addition to the form given there that the trade mark has been registered, or that sect. 77 of the Act of 1883 has been otherwise complied with, if the action be for the purpose of restraining the infringement of a trade mark. If the action be in respect of the illegal use of a trade name, the statement of claim should, if there has not been registration, allege that the trade name has been recognised in the market as designating the business of the plaintiff or goods made by him.

It is not necessary to allege fraud in order to obtain protection (*r*).

The defences generally set up are as follows:—(1) The plaintiff has no title to the trade mark in question: (2) The defendant has an independent or concurrent right to use the mark: (3) The plaintiff has not complied with sect. 77 by obtaining registration or refusal of the mark: (4) There is no infringement: (5) The plaintiff is debarred from suing by estoppel, acquiescence, delay, or because the trade mark is deceptive, or the plaintiff's trade fraudulent.

The ordinary rules governing discovery apply to trade mark Discovery

(*k*) *Collins Co. v. Reeves*, 4 Jur. N.S. J. Ch. 37.

865; *Collins v. Walker*, 7 W. R. (*n*) Ord. XIX. 4.

222.

(*o*) Ord. XIX. 5.

(*l*) *Magnolia Co. v. Atlas Co.*, 14 (*r*) *Singer Manufacturing Co. v.*
R. P. C. 389. *Wilson*, 3 App. Ca. 391, *per Lord*

(*m*) *Wheeler and Wilson Manu- Cairns.*
facturing Co. v. *Shakespear*, 39 L.

Chap. IX.

actions (s). But in trade mark cases the ordinary order for discovery may be very oppressive (t). The Court therefore will modify the common orders so that they shall cause no more inconvenience to the party interrogated than is necessary to ascertain the rights of his opponent (u).

The Court has wide powers under Order 50, r. 3, and may make an order to enter the premises of the defendant for the purpose of inspecting and taking samples (x).

A defendant in an action for an injunction against the use of a trade mark in connection with certain goods is not entitled to interrogate the plaintiff as to the sales made by the plaintiff during all the time that the plaintiff claims to have used the name (y).

Trade mark must make no mis-statement or false representation.

The interference of the Court to restrain the piracy of a trade mark being founded on pure equitable principles (z), a trader will not be protected if he is using a deceptive trade mark or if he is using his mark for the purposes of a fraudulent trade (a). A trader who falsely leads purchasers to believe that they are buying something different from that which in fact he is selling, or is guilty of any misrepresentation with respect to his goods as to amount to a fraud upon the public, disentitles himself as against a rival trader to that relief which he would have otherwise obtained (b). If a trade mark represents an article as protected by a patent, when in fact it is not so protected, such a statement amounts *primâ facie* to a misrepresentation of an important fact, which would disentitle the owner of the mark to relief against any man who pirated it (c).

(s) *Orr v. Diaper*, 4 Ch. 92.

(t) *Wills' Trade Marks*, (1892) 3 Ch. 201.

(u) *Carver v. Pinto Leite*, 7 Ch. 97; *Benedictus v. Sullivan*, 12 R. P. C. 25.

(x) *Hennessy, &c., Co. v. Rohman*, 36 L. T. 51, W. N. (1877) 14.

(y) *Benbow v. Low*, 16 C. D. 93 (C. A.).

(z) *Maxwell v. Hogg*, 2 Ch. 307; *Lee v. Haley*, 5 Ch. 161.

(a) For cases as to what is a fraudulent trade, see Kerly, p. 409.

(b) *Pidding v. How*, 8 Sim. 477;

Perry v. Truefitt, 6 Beav. 76; *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. C. 523; *Lee v. Haley*, 5 Ch. 155; *Re Wood's Trade Mark*, 32 C. D. 264; *Newman v. Pinto*, 57 L. T. 31, W. N. (1887) 119.

(c) *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. C. 543, per Lord Kingsdown; *Flavel v. Harrison*, 10 Ha. 467; *Morgan v. M'Adam*, 36 L. J. Ch. 228; *Leather Cloth Co. v. Lonsont*, 9 Eq. 352.

In the case of *Edelsten v. Vick* (d), Lord Hatherley doubted whether the rule would be the same if there had been originally a patent, and the statement in the trade mark being true when first introduced, had been continued after it had ceased to be true. But there can be no distinction between the cases. If the word "patent" be not so used as to indicate the existing protection of a patent, but merely as part of the designation of an article thrown into the market, nobody is meant to be deceived, and nobody is deceived (e). A patent may have expired and be known to have expired fifty years ago, and yet the name of patent may have become attached to the article, and be used in the trade as designating it (f). But if the trade mark represents the article as protected by a patent, when in fact it is not so protected, there is no difference whether the protection never existed or has ceased to exist. If the true effect of the trade mark or label be to mislead the public, that is sufficient to debar the plaintiff from relief (g). But the use of the word patent is not to be taken as misleading where either it is shown that the market name of the goods comprises the word or where the goods are made according to an expired patent, and the word is so used as to be understood to refer to this, or wherein from the nature of the case it is unlikely to mislead (h).

Use of the word
"patent."

The principle that a misstatement in a trade mark will deprive a man of his right to apply to the Court for relief, does not apply to the case of the use of the name of a firm by successors in business of the original partners. The name of a firm may be used long after all the original partners have died, or have ceased to have any interest in the concern. By the usage of trade the name of a firm is understood not to be confined to those who first adopted it, but to extend to and include persons who have been afterwards introduced as

A trade mark
must not be used
so as to deceive.

(d) 11 Ha. 87.

(e) 11 H. L. C. 544, per Lord Kingsdown.

(f) *Marshall v. Ross*, 8 Eq. 651.

See *Cheavin v. Walker*, 5 C. D. 862.

(g) *Leather Cloth Co. v. American*

Cloth Co., 11 H. L. C. 544; *Cheavin v. Walker*, 5 C. D. 850. Comp. *Hayward v. Lely*, 56 L. T. 419.

(h) *Cockrane v. Macnish*, (1896) A. C. 225; and see Kerly on Trade Marks, p. 403.

Chap. IX.

partners, or persons to whom the original partners have transferred their business. The use, therefore, of the old trade name of a firm by the new partners or their successors is no fraud upon the public, but is merely a statement that they are carrying on the same business as was formerly carried on by the person or persons whose name constituted the trade mark (i).

The case, however, is different if a trade mark be so completely personal in its nature as necessarily to indicate that the goods to which it is affixed are the manufacture of a particular person. If a person has acquired by his personal skill and ability a reputation which gives his goods in the market a higher value than those of others, there is an imposition on the public, if a man, to whom he has transferred his business, uses his name or trade mark. A man may assign his business to another, but he cannot give him the right to use his name or mark, if the effect of the statement be necessarily to indicate that the goods to which it is affixed are the goods of the person whose name and mark they bear, and the value of the goods be materially affected by the statement (k). If, however, a trade mark be a mark which refers more closely to the place of manufacture or to the particular business than to the firm of the manufacturer, although it may originally have denoted the person by whom the goods were manufactured, or if it has become a sign of quality, and ceased to denote that a particular person carries on the business, the assignee of the business and business premises is not guilty of a misrepresentation to the public in making use of the mark (l). In many cases the name of the first maker of an article is accepted in the market either as a brand of quality or it becomes the denomination of the article itself, and is no longer a representation that the article is the manufacture of any particular person (m).

- | | |
|---|---|
| <p>(i) <i>Leather Cloth Co. v. American Cloth Co.</i>, 11 H. L. C. 542. See <i>Singer Manufacturing Co. v. Loog</i>, 8 App. Ca. 33, per Lord Blackburn.</p> <p>(k) <i>Leather Cloth Co. v. American</i></p> | <p><i>Cloth Co.</i>, 4 D. J. & S. 137, 143; <i>Bury v. Bedford</i>, ib. 352, 369.</p> <p>(l) <i>Bury v. Bedford</i>, <i>supra</i>.</p> <p>(m) <i>Hall v. Barrows</i>, 4 D. J. & S. 155.</p> |
|---|---|

That, however, which is merely a collateral misrepresentation must be distinguished from false representation in the trade mark or fraud in the trade itself. Though the Court will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark or if the trade itself is fraudulent, a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity (*n*). Where, accordingly, the plaintiff, whose trade mark was "Ford's Eureka Shirts," had falsely represented in his invoices and in a few advertisements that he was "patentee" of the shirt, it was held that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being clear, he was entitled to an injunction (*o*). A misrepresentation which has been corrected and abandoned before the action is no bar (*p*), and it would seem that the same rule applies to one adopted after the commencement of the action (*q*).

It has not been determined whether a mere puffing exaggeration in labels, &c., is such a misstatement as will deprive a man of his right to the protection of the Court; but the rule would appear to be, that a mere puffing exaggeration, by which no reasonable man ought to be deceived, goes for nothing (*r*).

The owner of a trade mark who seeks the aid of the Court for the protection of his mark must use due diligence in making the application. Delay and acquiescence, or gross delay amounting to an abandonment of the right, may deprive a man of his right to the protection of the Court (*s*). A protest by the owner of the mark against the use of it, or merely threatening

Delay and
acquiescence.

(*n*) *Ford v. Foster*, 7 Ch. 611.

(*r*) *Holloway v. Holloway*, 13

(*o*) *Ib.* See *Macfarlane v. Oak Foundry Co.*, 10 Dec. of Court of Sess. 4th ser., 805. Comp. *Newman v. Pinto*, 57 L. T. 31, W. N. (1887) 119.

Beav. 209. See *Perry v. Truefitt*, 6 Beav. 76.

(*p*) *Benedictus v. Sullivan*, 12 R. P. C. 25.

(*s*) *Chappell v. Sheard*, 2 K. & J. 117; *Estcourt v. Estcourt Hop Essence Co.*, 10 Ch. 280; *Isaacson v. Thompson*, 41 L. J. Ch. 101; *National Starch Co. v. Munn's Co.*, (1894) A. C. 275.

(*q*) *Siegert v. Findlater*, 7 C. D. 808.

Chap. IX.

without taking proceedings, is not sufficient if the plaintiff stands by and allows a man to carry on business in the manner complained of (*t*), but the Court will not readily infer acquiescence (*u*).

Mere delay after knowledge of the infringement to take proceedings, not sufficient to call the Statute of Limitations into operation, or where the infringement continues, is not it seems a bar to the right to an injunction (*x*). The rule is not peculiar to trade mark cases, but is part of the general law (*y*). Where an injunction is sought in aid of a legal right, it is a matter of course if the legal right be proved. Lapse of time unaccompanied by anything else is, it seems, no more a bar to a suit for an injunction than it is to an action of deceit (*z*).

But delay may cause the Court to refuse an interlocutory injunction either on terms of the defendant keeping an account or absolutely, especially if the defendant has built up a large trade in which he has notoriously used the mark; but a slight use of the mark will not prevent the Court from interfering (*a*).

Delay, moreover, may prevent conduct which would at first be an infringement from being calculated to deceive (*b*), and where the infringements are numerous and notorious, may amount to abandonment of the trade mark (*c*). But delay is not a bar where it can be explained away, where for instance it takes place in order that the plaintiff may obtain evidence necessary to establish his case (*d*).

In a plain case the motion for an injunction is often made *ex parte*; and where the defendant is committing a deliberate fraud it is important to obtain an *ex parte* order before giving the defendant a notice which may lead to the disposal of any spurious goods which he is about to put upon the market.

Colourable imitation and infringement.

It is impossible to lay down any general rule as to what degree of resemblance is necessary to constitute the fraudulent

(*t*) *Rowland v. Mitchell*, 13 R. P. C. p. 464.

(*u*) S. C. 14 R. P. C. p. 44.

(*x*) *Fullwood v. F.*, 9 C. D. p. 178.

(*y*) *Three Towns Banking Co. v. Maddever*, 27 C. D. 533.

(*z*) *Fullwood v. F.*, *supra*.

(*a*) *Apollinaris Co. v. Herrfeldt*, 4 T. L. R. 9.

(*b*) *Londonderry v. Russel*, 3 T. L. R. 360.

(*c*) *Lee v. Haley*, 5 Ch. 155, 160.

(*d*) *National Starch Co. v. Munn's Co.*, (1894) A. C. 275.

or colourable imitation of a trade mark. All that can be done is to ascertain in every case as it occurs, whether there is such a resemblance as that ordinary purchasers purchasing with ordinary caution are likely to be misled. The principles governing the comparison of the marks and determining what amount of resemblance is calculated to deceive cannot however be discussed at length in this place ; it is only attempted here to state some of the conclusions which may be deduced from an examination of the authorities (e).

In considering whether a spurious mark is calculated to deceive, the persons with regard to whom the question is to be asked are the probable purchasers, not merely careful and intelligent persons, but ordinary unwary purchasers. What amount of intelligence or knowledge of the trade ought to be attributed to them must necessarily vary with the nature of each case.

No definite rule as to the amount of resemblance can be laid down, but the net impression produced and the main idea left on the mind by one mark must be compared with that left by the other, for marks may well be confused where only one is seen, though they could not be mistaken for each other if they were seen side by side. The whole mark of the defendant may too nearly resemble that of the plaintiff, although all the essential particulars of the two are distinguishable. Regard must be paid to the essential features of the plaintiff's mark in considering whether the defendant has infringed it.

Further, the marks must be compared as they are seen in actual ordinary use on the goods they are used for.

The circumstances of the trade and market in which the marks are used must also be considered.

Attention must also of course be paid, not only to the points of resemblance between the marks, but also to the points of difference ; but it will not be sufficient for the defendant to show that the differences might prevent purchasers being deceived (f).

Colourable
imitations and
infringement.

(e) See Kerly on Trade Marks, 244 et seq., 277 et seq., where the subject is very fully and ably discussed.

(f) *Johnston v. Orr Ewing*, 7 App. Ca. p. 230.

Chap. IX.

Nor is it an excuse for a clear infringement of a trade mark that the infringing mark is used upon goods of which the get up differs *in toto* from that of the plaintiff's goods (*g*).

The use of words taken from the plaintiff's trade mark by the defendant is an infringement, notwithstanding that he adds his own name (*h*).

Probability of deception is a question of fact, and except so far as they lay down any general principle of comparison the decided cases are of no assistance (*i*).

Importation of articles with a spurious brand.

The importation of spurious articles to which the trade mark of another is affixed is an infringement of the right and unlawful, however innocently the importer may have acted, and notwithstanding that he determined not to sell the articles as soon as he became aware that their importation was an infringement of the right (*k*).

Trade mark imposed on goods made by another.

It seems that a manufacturer is entitled to place his trade mark on articles, not of his own make, unless there is some trade custom or contract that he shall not do so, and to remove the maker's mark for the purpose of substituting his own (*l*). But the Court will not, as a general rule, interfere by injunction to protect a trade mark unless the goods are manufactured or at least selected by the person whose trade mark it purports to be (*m*).

Injunction notwithstanding promise not to use the mark.

The owner of a trade mark, whose mark has been illegally taken by another, is not bound to rely upon his assurance or promise not to repeat the illegal appropriation of the mark, but is entitled to the protection of the Court by injunction (*n*). Nor is it necessary that any actual infringement should have occurred if it is proved that the defendant contemplates committing one, and it is sufficient evidence of this that he is in possession of a considerable quantity of spurious

(*g*) *Apollinaria Co. v. Herrfeldt*, 4 (1892) 1 Ch. 630.

R. P. C. 478.

(*h*) *Johnson v. Raylton*, 7 Q. B. D.

(*i*) See cases collected in Kerly, 451.
p. 380.

(*m*) *Hirsch v. Jonas*, 3 C. D. 584.

(*l*) Per Lord Watson in *Johnston v. Orr Ewing*, ante.

(*n*) *Millington v. Fox*, 3 M. & C. 338; *Welch v. Knott*, 4 K. & J. 747;

(*k*) *Upman v. Forrester*, 24 C. D. 231; *American Tobacco Co. v. Guest*,

Edelsten v. Edelsten, 1 D. J. & S. 185.

goods (o), even though they are only in his possession as a forwarding agent (p). "The life of a trade mark depends upon the promptitude with which it is vindicated," and therefore the plaintiff is not bound to give the defendant notice, before issuing the writ and serving the defendant with notice of motion for an injunction to restrain him from parting with the goods. It is immaterial that the defendant may have been innocent in the matter (q), and may have used the trade mark in ignorance of the right of the plaintiff. Nor is it necessary to prove fraud. The action of the Court depends on the right of the plaintiff, and the injury done to that right. If the public has been in fact misled, it is immaterial that the defendant may have had no intention to mislead (r). A trader on whose goods the trade mark of another is put cannot be allowed to say that it was done by one of his servants without his knowledge (s). A man, however, who has innocently advanced money upon dock warrants for goods to which a certain trade mark has been fraudulently affixed may, upon offering to remove the mark, have an injunction dissolved which was granted to restrain the wharfinger from parting with the goods (t).

The injunction is sometimes directed generally to restrain the infringement of the plaintiff's trade marks to which his title is established in the case, but it is usually expressed with more particularity, to restrain the use by the defendant of such trade marks, or of marks only colourably differing from them in connection with goods of the kind for which they are registered, by selling or otherwise disposing of the goods marked with such marks. To avoid a discussion on a motion to commit for breach of the injunction it is obviously advantageous for the plaintiff to combine in the order a particular reference to the form of infringement complained of together

Form of
injunction.

(o) *Upman v. Forrester*, 24 C. D. 231.

(p) *Upman v. Elkan*, 12 Eq. 140, 7 Ch. 130.

(q) *Upman v. Forrester*, 24 C. D. 231.

(r) *Singer Manufacturing Co. v. Wilson*, 3 App. Ca. 391, per Lord Cairns.

(s) *Tonge v. Ward*, 21 L. T. 480.

(t) *Ponsardin v. Peto*, 33 Beav. 642.

Chap. IX.

Account.

with wide general words directed to prevent a colourable evasion of the order (*u*).

A man whose trade mark has been illegally taken by another is entitled to an account of profits in respect of the illegal user of the mark (*x*). The account is limited to sales and profits acquired for six years before the commencement of the action. But in the case of an innocent user by the defendant, the account of profits will only be directed from the time when he first became aware of the spuriousness of the mark (*y*).

In taking the account, a man will not have to account for every species of profit made during the previous six years, but only for so much as is properly attributable to the user of the mark (*z*), nor will he be charged with bad debts as profits; but on the other hand, he cannot charge the plaintiff with the cost of manufacturing the goods in respect of which the bad debts have been incurred (*a*).

Where there is no trade mark, but the defendant has sold goods in packets so resembling those in which the plaintiff wraps his goods as to be calculated to deceive, the account will be of all profits made in selling the goods in the form in which defendant was not entitled to sell them. Although retail dealers who may have bought the goods from the defendant may not have been deceived, the account will not be limited by excluding from it goods which the retail dealers may have sold to persons who bought them as goods of the defendant (*b*).

When one of two persons entitled in common to the use of a trade mark is suing alone, he should on praying for the account pray for the payment to himself of such part of the profits as he may be entitled to (*c*); but the defendant is it

(*u*) For forms of injunction, see 292.

Kerly, p. 748.

(*x*) *Cartier v. Carlisle*, 31 Beav. 292; *Edelsten v. Edelsten*, 1 D. J. & S. 199; but see *Holgyson v. Kynoch*, 15 R. P. C. 465.

(*y*) *Moet v. Couston*, 33 Beav. 578.

(*z*) *Cartier v. Carlisle*, 31 Beav.

(*a*) *Edelsten v. Edelsten*, 10 L. T.

780.

(*b*) *Lever v. Goodwin*, 36 C. D. 1; *Saxlehner v. Apollinaris Co.*, (1897) 1 Ch. 893.

(*c*) *Dent v. Turpin*, 2 J. & H. 139.

seems entitled to have the other co-owner made a party, so that the account may be taken once for all (*d*).

Neither an account nor an inquiry as to damages will be granted if the evidence of sales under the objectionable mark is not sufficient to make it worth while (*e*); or if the defendant has only used his mark for a short time (*f*).

The owner of a trade mark though entitled to an injunction may by his conduct deprive himself of the right to an account of profits for six years previously to bringing the action (*g*).

The plaintiff must elect between the account and an inquiry as to damages; he cannot have both (*h*). On an inquiry as to what damage has accrued to a man from the unlawful use by another of his trade mark, the onus lies on him to prove special damage by loss of custom or otherwise, and it will not be assumed in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiff but for the defendant's unlawful user of the mark (*i*).

The defendant must, if required to do so for the purposes of the account or the inquiry as to damages, disclose the names of all persons to whom he has sold any goods with the mark imposed on them. If he be unable to do so, he may then be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were not stamped with the mark (*k*).

Subject to sect. 77a of the Act (*l*) with regard to certificate as to exclusive use and costs thereon, the cost of an action for

(*d*) 44 C. D. p. 392.

(*e*) *Magnolia Co. v. Atlas Co.*, 14 R. P. C. 389, where neither was granted, although the plaintiffs obtained an injunction.

(*f*) *Rose v. Loftus*, 47 L. J. Ch. 576.

(*g*) *Harrison v. Taylor*, 11 Jur. N. S. 408; *Ford v. Foster*, 7 Ch. 633.

(*h*) *De Vitre v. Betts*, 6 L. R. H. L. 321.

(*i*) *Leather Cloth Co. v. Hirsch-*
K.I.

field, 1 Eq. 299; *Magnolia Co. v. Atlas Co.*, 14 R. P. C. 389. See as to measure of damages, *Graham v. Plate*, 6 American R. 639; *United Telephone Co. v. Walker*, 56 L. T. 508; *Alexander v. Henry*, 12 R. P. C. 360.

(*k*) *Leather Cloth Co. v. Hirsch-*
field, 1 H. & M. 295; *Sacharin Corporation v. Chemicals Co.*, (1900) 2 Ch. 556.

(*l*) Act of 1888, s. 18.

Chap. IX.

Costs.

infringement, like the costs in any other action, are in the discretion of the Court.

The question of costs turns upon the conduct of the parties in the matter. A man whose trade mark or trade name has been taken by another is entitled to the costs of the injunction (*m*). If the defendant does not contest his right, but offers to submit to the injunction with costs, the plaintiff has obtained all he is entitled to, and should not bring the cause to a hearing. If he asks for something more and brings his cause to a hearing but fails to make out his right, he loses his right to the subsequent costs of the action. But if the defendant upon notice of the plaintiff's right and the fact of its violation, instead of submitting to the injunction with costs, contests the plaintiff's right or refuses any of the terms to which the plaintiff is entitled, the cause may be brought to a hearing and the plaintiff will have the cost of the suit (*n*). So also a person having in his hands or under his control goods bearing a forged trade mark is bound upon the fact being brought to his knowledge at once to submit to do whatever he may be compelled to on an action being brought against him; otherwise, however innocently the goods may have come to him he will be liable for the costs of an action brought by the person whose right is infringed for the purpose of obtaining relief (*o*). In a case where the Court was of opinion that both plaintiff and defendant were deceiving the public, no costs were given (*p*).

Though the case for an injunction may fail, the dismissal of the action may be without costs, if the defendant has been to blame in the matter (*q*). If a trader imitates another's label

(*m*) *Guardian Fire and Life Insurance Co. v. Guardian and General Insurance Co.*, 50 L. J. Ch. 255.

(*n*) *Millington v. Fox*, 3 M. & C. 338; *Pierce v. Franks*, 15 L. J. Ch. 122; *Woollam v. Ratcliff*, 1 H. & M. 259; *Edelsten v. Edelsten*, 1 D. J. & S. 185; *Moet v. Couston*, 33 Beav. 578; *Macandrew v. Bassett*, 4 D. J. & S. 386; *Hipkins v. Plant*, 15 R.

P. C. 294.

(*o*) *Upman v. Ellean*, 12 Eq. 140, 7 Ch. 132; *Moet v. Pickering*, 8 C. D. 372; *Upman v. Forrester*, 24 C. D. 231; *Slazenger v. Pigott*, 12 R. P. C. 439.

(*p*) *Estcourt v. Estcourt Hop Essence Co.*, 10 Ch. 280; *Thornclue v. Hill*, 11 R. P. C. 61.

(*q*) *Rodgers v. Rodgers*, 22 W. R.

or trade mark, even though the case may be one where the Court may refuse an injunction, it will not willingly give the defendant his costs (*r*). If the defendant makes a proper offer, as to make an alteration in his trade mark so as to distinguish it more completely from that of the plaintiff, which offer the plaintiff declines and brings the suit to a hearing, the plaintiff will be ordered to pay the defendant his costs (*s*). Infancy will not protect a man from being ordered to pay the costs of the suit (*t*).

A man who has induced another to manufacture for him goods marked with the trade mark of a third person is liable to repay to the person whom he has made the instrument of fraud the cost of legal proceedings brought about by the infringement, including any sum which that person may have reasonably paid to compromise the matter (*u*).

Costs on the higher scale are sometimes given, but only where some special reason for the order is shown, and they are not ordered as a punishment (*x*). The order ought only to be made in cases of very unusual difficulty requiring skill, antiquarian research or the like (*y*).

In a case where wharfingers were in possession of goods bearing a brand in spurious imitation of the brand of the plaintiff, it was held that the plaintiff was entitled to have the brand removed, but that his lien on the goods for his costs, if it did exist, must be postponed to the wharfinger's costs (*a*).

Removal of
trade mark and
lien on goods for
costs.

888; *Wylam v. Clarke*, W. N. (1876) Q. B. 531; *Redilaway v. Banham*, (1896) A. C. p. 222.

(*r*) *Bass v. Dawber*, 19 L. T. 627. (*y*) *Gadd v. Manchester (Mayor, &c.)*, 9 R. P. C. p. 535, *per* Lindley, L. J.

(*s*) *Ib.*

(*t*) *Chubb v. Griffiths*, 35 Beav. 127.

(*u*) *Dixon v. Fawcus*, 3 El. & El. 546. (*a*) *Upman v. Elkan*, 12 Eq. 140, 7 Ch. 132; *Moet v. Pickering*, 8 C. D. 372.

(*x*) *Paine v. Chisholm*, (1891) 1

CHAPTER X.

INJUNCTIONS IN RESPECT OF COVENANTS OR AGREEMENTS.

SECTION I.—INJUNCTIONS AGAINST BREACH OF COVENANT OR AGREEMENT.

Chap. X.
Sect. 1.
Jurisdiction.

THE jurisdiction of the Court by interlocutory injunction against breach of covenant or agreement is in aid of the legal right. The jurisdiction is exercised either by way of injunction or by way of specific performance. The consideration and principles upon which the Court acts in restraining by injunction breaches of covenant differ in a material respect from those upon which it acts in decreeing specific performance. It is not the practice of the Court to decree specific performance of part of an agreement, where there are other parts which it cannot carry out. Unless the whole agreement can be specifically enforced, and complete justice be done between the parties, the Court will, as a general rule, decline to interfere (a). The Court will not interpose partially, except in cases in which the parts of the agreement, which cannot be specifically enforced, are independent of those which may be specifically performed (b), or are subordinate provisions (c).

(a) *Gervais v. Edwards*, 2 Dr. & War. 80; *South Wales Co. v. Wythes*, 5 D. M. & G. 880; *Phipps v. Jackson*, 56 L. J. Ch. 550. But as to whether this rule applies to executed contracts or only to executory contracts, see *Rigby v. Great Western Railway Co.*, 15 L. J. Ch. 266, 271; *Wolverhampton Railway Co. v. London and North Western*

Railway Co., 16 Eq. 433; and see Fry, 3rd ed., 384.

(b) *Gibson v. Goldmid*, 5 D. M. & G. 757; *Kernot v. Potter*, 3 D. F. & J. 447; *Ogden v. Fossick*, 4 D. F. & J. 426.

(c) *Blackett v. Bates*, 2 H. & M. 270. See *Hamilton v. Hector*, 13 Eq. 511, as to covenants in a separation deed.

The consideration and principles, upon which the Court interferes by way of injunction, rest upon irreparable injury. The Court does not look to the effect which may be ultimately produced by the restraint which is placed on the party who is disposed to break his contract, but gives all the relief in its power, and leaves nothing unperformed which it can ever be called upon to perform.

Chap. X.
Sect. 1.

In all cases where specific performance can be decreed, the jurisdiction by injunction will attach as a matter of course, but it is not confined to such cases, but will be exercised in all cases where it can operate to bind men's consciences as far as they can be bound to a true and literal performance of their agreements. The Court will not suffer men to depart from their agreements at their pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give (*d*). Nor will it refrain from granting an injunction only because there are other covenants to be performed which may be possibly broken hereafter (*e*). The interference of the Court by way of injunction cannot however be had, unless the part of the agreement which is sought to be enforced is separable from, and forms a distinct part of the agreement (*f*).

Injunction
and specific
performance.

The jurisdiction of the Court by way of interlocutory injunction against breach of covenant or contract being in aid of the legal right, and having for its object the protection of the property from irreparable damage pending the trial of the right, a man who seeks the aid of the Court must be able to show a good *prima facie* legal title to the right which he asserts (*g*). If the right at law under the covenant is clear or fairly made out, and the breach of it is clear or fairly made out, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to

Principles on
which the
jurisdiction
is exercised.

(*d*) *Lumley v. Wagner*, 1 D. M. & G. 619; *De Mattos v. Gibson*, 4 D. & J. 282.

Chester, Sheffield, and Lincolnshire Railway Co., 7 Ha. 482.

(*e*) *Rigby v. Great Western Railway Co.*, 15 L. J. Ch. 271, per Wigram, V.-C.; S. C., on appeal, 2 Ph. 44; and see *Waring v. Man-*

(*f*) *Kernot v. Potter*, 3 D. F. & J. 459.

(*g*) *Capes v. Hutton*, 2 Russ. 357; *Saintier v. Ferguson*, 1 Mac. & G. 289; *ante*, p. 12.

Chap. X.
Sect. 1.

restrain the breach. But if the right at law under the covenant is not clear, or is not fairly made out, or the breach of it is doubtful and no serious injury can arise to the plaintiff, pending the trial of the right, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld (*h*).

Threatened
breach of
covenant.

It is not necessary that the breach in respect of which the interference of the Court is sought should have been actually committed: it is enough that the defendant claims and insists on his right to do the act complained of, although he may not have actually done it (*i*). But the Court will not interfere unless it is clear that a breach is intended. The Court will not assume that a man means to violate his agreement (*k*).

Undertaking
as to damages.

The Court may at its discretion, as a condition of ordering the motion to stand over, require the defendant to keep an account and give an undertaking as to damages (*l*); or on granting an injunction may require the plaintiff to give an undertaking as to damages or to submit to account, as the Court may direct (*m*).

The circumstance that a lessor has the right of re-entry for breach of a covenant does not preclude him from coming to the Court to restrain the breach (*n*).

In what cases
injunction will
be refused.

But to warrant the interference of the Court, it is not enough that the right at law under the covenant or contract be clear and the breach be clear. It is in all cases necessary that the covenant or contract should be of such a nature that it can consistently with the rules and principles of the Court be enforced. If the covenant or contract is from

(*h*) *Wilkinson v. Rogers*, 2 D. J. & S. 62, 69; *Garrett v. Banstead and Epsom Railway Co.*, 4 D. J. & S. 463; *ante*, pp. 20, 21. See, as to irreparable injury, *ante*, pp. 14, 15.

(*i*) *Tipping v. Eckersley*, 2 K. & J. 264; *ante*, pp. 13, 14.

(*k*) *Foster v. Birmingham, Wolverhampton, &c., Railway Co.*, 2 W. R. 378; *Worsley v. Swan*, 51 L. J. Ch. 576. See *Pattison v. Gilford*, 18 Eq.

259.

(*l*) *Rigby v. Great Western Railway Co.*, 5 Ph. 44; *Low v. Innes*, 4 D. J. & S. 288.

(*m*) *East Lancashire Railway Co. v. Hattersley*, 8 Ha. 72; *Ingram v. Stiff*, 5 Jur. N. S. 947; *ante*, pp. 22, 23.

(*n*) *Parker v. Whyte*, 32 L. J. Ch. 520.

its nature such that the Court cannot enforce specifically its performance, or if, from the nature of the act to be done or refrained from, the remedy lies peculiarly, at law, and a full and adequate compensation can be had there, the Court will not interfere (o). In a case in which A., as agent for B. and C. (C. being an infant), agreed to grant a lease to D., and D. brought an action for specific performance and claimed an injunction to restrain B. and C. until the trial from granting a lease to anyone else, it was held that as specific performance could not be granted in respect of the entirety it ought not to be granted in respect of the share of the adult defendant alone, and that accordingly an injunction should not issue against either defendant (p).

The Court will not entertain jurisdiction where the claim sought to be enforced is a mere money claim (q), or has been already treated between the parties as a proper subject for pecuniary compensation (r). Nor will the Court generally entertain jurisdiction in respect of contracts for building or other work (s). But this rule is not without exceptions. Where, for instance, a railway company has taken lands from a landowner on the terms that they will carry out certain works, the Court will compel them to carry out such works (t). A plaintiff in order to bring himself within the exception must establish (1) that the building work of which he seeks to enforce performance is clearly defined by the contract, (2) that the plaintiff has a substantial interest in having the contract performed which cannot be adequately compensated for by

(o) *Collins v. Plumb*, 16 Ves. 454; *Furness Railway Co. v. Smith*, 1 De G. & S. 299; *Holmes v. Eastern Counties Railway Co.*, 3 K. & J. 675; *Munro v. Wivenhoe, &c.*, *Railway Co.*, 4 D. J. & S. 733.

(p) *Lumley v. Ravenscroft*, (1895) 1 Q. B. 683 (C. A.)

(q) *Todd v. Gee*, 17 Ves. 273; *Sainsbury v. Jones*, 2 Beav. 462; *Glennie v. Imri*, 3 Y. & C. 436.

(r) *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119. See

Wood v. Sutcliffe, 2 Sim. N. S. 168. But see *Ainsworth v. Bentley*, 14 W. R. 630; *ante*, p. 15.

(s) *Kirk v. Bromley Union*, 2 Ph. 640; *South Wales Railway Co. v. Wythes*, 1 K. & J. 186, 5 D. M. & G. 880; *Garrett v. Banstead, &c., Railway Co.*, 4 D. J. & S. 462.

(t) *Ryan v. Mutual Tontine, &c.*, (1893) 1 Ch. p. 128, *per Kay*, L. J.; *Fortescue v. Lostwithiel, &c.*, (1894) 3 Ch. 621.

Chap. X.
Sect. 1.

damages, and (*semble*) (3) that the defendant has by the contract obtained possession of the land on which the buildings are to be erected (*u*).

Nor will the Court entertain jurisdiction in the case of covenants or agreements for personal services, or involving duties of a personal and confidential character (*x*), or involving supervision which the Court could not undertake (*y*). Nor will the Court interfere if the covenant is vague, indefinite, or uncertain in its terms (*z*), or if it appears in its form to be harsh and oppressive (*a*), or if the contract is of such a nature that one of the contracting parties would gain considerable advantage at the expense of the other from its enforcement, while the other would gain no corresponding benefit (*b*).

Conduct of the party who makes the application will be taken into consideration.

The conduct of the party who seeks the aid of the Court will be taken into consideration upon the application for an injunction. A man who comes to the Court to restrain the breach of a covenant or contract must be able to show that he comes with clean hands (*c*). He cannot invoke the aid of the Court, if the covenant which he seeks the aid of the Court to enforce is in any way tainted with illegality (*d*). Nor can he have relief, unless it appear that he has actually carried out, as far as in him lies, his own part of the agreement (*e*), and unless he can show that he has used due diligence in making the application.

(*u*) *Wolverhampton Corporation v. Emmons*, (1901) 1 Q. B. p. 525, *per* Romer, L. J.; Fry, 3rd ed., 46.

(*x*) *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249; *Johnson v. Shrewsbury and Birmingham Railway Co.*, 3 D. M. & G. 914; *Millican v. Sullivan*, 4 Times R. 204.

(*y*) *Ryan v. Mutual Tontine, &c.*, (1893) 1 Ch. 116 (C. A.).

(*z*) *Mann v. Stephens*, 15 Sim. 379; *Low v. Innes*, 4 D. J. & S. 288; *Davies v. Davies*, 36 C. D. 359.

(*a*) *Kimberley v. Jennings*, 6 Sim. 340; *Talbot v. Ford*, 13 Sim. 173.

(*b*) *Shrewsbury and Birmingham Railway Co. v. London and North Western Railway Co.*, 6 H. L. C. 113; *Vivers v. Tuck*, 1 Moo. P. C. N. S. 516.

(*c*) See *Stiff v. Cassell*, 2 Jur. N. S. 348; *Maythorne v. Palmer*, 11 Jur. N. S. 230; *ante*, p. 15.

(*d*) *Davies v. Makuna*, 29 C. D. 596.

(*e*) *De Mattos v. Gibson*, 4 D. & J. 276; *Peto v. Brighton, Uckfield, and Tunbridge Railway Co.*, 1 H. & M. 468; *Fechter v. Montgomery*, 33 Beav. 22; *Telegraph Despatch, &c., Co. v. M'Lean*, 8 Ch. 658.

Chap. X.
Sect. 1.

Delay, acquiescence, waiver.

Delay or acquiescence may disentitle a plaintiff to relief (*f*). If a covenantee suffer the long and continuous (*e.g.*, twenty-four years) user of the property by the covenantor in a manner wholly inconsistent with the tenor and purpose of a restrictive covenant subject to which the property was conveyed, this is tantamount to a waiver and release of such covenant (*g*). A covenantee who seeing a covenantor spend monies upon property in doing acts which are inconsistent with the terms of the covenant, but upon the faith that no obstacle will be afterwards thrown in the way of his enjoyment, stands by and makes no objection while the monies are being expended (*h*), or whose own acts have been inconsistent with the covenant, or who has acquiesced in the doing of acts which are inconsistent with it, cannot come to a Court of equity to have the covenant or contract enforced (*i*). Thus, where the leases of an estate contained covenants by the lessees which were intended to be for the general benefit of them all: *e.g.*, a covenant to build on a uniform plan, and the landlord let loose some of his tenants from the obligations of the covenants, the Court would not interfere to prevent a similar infringement by others of the tenants (*k*). Nor would the Court restrain the erection of buildings contrary to a covenant, where the plaintiff had himself erected buildings, the effect of which was to destroy those very advantages which the covenant was intended to maintain (*l*). Nor will the Court enforce a restrictive covenant by injunction on the application

(*f*) *Pollard v. Clayton*, 1 K. & J. 462; *Maythorne v. Palmer*, 11 Jur. N. S. 230; *ante*, pp. 16—20.

(*g*) *Hepworth v. Pickles*, (1900) 1 Ch. 108; and see *Pilson v. Spratt*, 25 L. R. Ir. 5.

(*h*) *Johnstone v. Hall*, 2 K. & J. 414; *Eastwood v. Lever*, 4 D. J. & S. 114; *ante*, pp. 16, 17.

(*i*) *Child v. Douglas*, 5 D. M. & G. 739; *Whitehead v. Bennett*, 9 W. R. 627; *Sayers v. Collyer*, 28 C. D. 103.

(*k*) *Roper v. Williams*, T. & R.

18; comp. *Western v. M'Dermott*, 2 Ch. 72; *Peek v. Matthews*, 3 Eq. 409.

(*l*) *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552; comp. *Kemp v. Sober*, 1 Sim. N. S. 517; *Johnstone v. Hall*, 2 K. & J. 414; *Western v. M'Dermott*, 2 Ch. 72. See *Shrewsbury and Birmingham Railway Co. v. Stour Valley Railway Co.*, 2 D. M. & G. 866, 882; *Doherty v. Allman*, 2 App. Ca. 730.

Chap. X.
Sect. 1.

Acquiescence
and waiver.

of a man who has wilfully allowed it to be broken by other persons who were bound to the same restrictive covenants (*m*).

Nor will relief be given where there has been for a considerable time a violation of the agreement in respect of which relief is sought both by defendant and plaintiff (*n*). But the case is different if the covenant, though entered into by the landlord with all his tenants, is only a covenant for the benefit of each tenant, and not one for the benefit of all the other tenants (*o*), or if it is left to the landlord himself to determine what tenants shall be let loose from the obligations of the covenant (*p*). Nor is the equity of a *cestui que* trust to require the due performance of a covenant necessarily displaced by a breach of duty on the part of the trustees (*q*). Nor will the principle as to acquiescence be carried so far as to hold a man who has permitted one infringement of a covenant bound to permit another (*r*). Nor will a landlord be held to have waived his restrictive covenants over an extensive estate by merely permitting some tenant or other who lives at a distance to do something which was prohibited by his covenant (*s*). Nor will passive acquiescence in a breach of covenant attended with no damage, or at least with trifling damage, preclude a man from complaining of a breach whereby his enjoyment is directly and substantially affected (*t*). Nor will relief be refused merely because in a few instances the covenants have not been enforced (*u*).

Conduct of
plaintiff—how
far considered.

Nor is it every breach of a covenant upon his part which prevents a man from coming to the Court to have a covenant enforced. There must be some such material and substantial

(*m*) *Kelsey v. Dodd*, 52 L. J. Ch. 34; *Sayers v. Collyer*, 28 C. D. 103; *Knight v. Simmonds*, (1896) 2 Ch. 294 (C. A.).

(*n*) *Sheard v. Webb*, 2 W. R. 343.

(*o*) *Patching v. Dubbins*, Kay, 1.

(*p*) *Scarisbrick v. Tunbridge*, 3 Eq. Rep. 243. See *Kemp v. Sober*, 1 Sim. N. S. 517.

(*q*) *Eastwood v. Lever*, 4 D. J. & S. 114.

(*r*) *Lloyd v. London, Chatham,*

and Dover Railway Co., 2 D. J. & S. 568.

(*s*) *German v. Chapman*, 7 C. D. 271.

(*t*) *Western v. M'Dermott*, 2 Ch. 72; *Richards v. Revitt*, 7 C. D. 224; *Nottingham Patent Brick Co. v. Butler*, 15 Q. B. D. 268. See further, as to acquiescence, *ante*, pp. 16—19.

(*u*) *Knight v. Simmonds*, (1896) 1 Ch. 294; (1896) 2 Ch. 294.

breach as will enable the Court to say that his conduct has been such that it ought not to interfere. Where for example a man is a lessee with a proviso that he may purchase on a six months' notice and he does not pay his rent punctually, he is not thereby debarred from exercising the option and obtaining specific performance of the purchase (*x*). So also a husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for restitution of conjugal rights by reason of trifling breaches of covenant on his part (*y*). Nor is a man precluded from obtaining an injunction to restrain a breach of covenant by which his property is materially affected by the fact that he himself may, in building his house, have deviated in a trifling degree from the letter of the covenant (*z*), or by the fact that he himself may have broken another covenant when the covenants are essentially different from each other and the covenant which he has broken is of much slighter importance than the covenant which he seeks to enforce (*a*). Nor will the mere delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant amount to such acquiescence as to disentitle him to an injunction (*b*).

The jurisdiction to grant an injunction being discretionary, the Court in exercising it will have regard to the way in which the granting relief will affect the rights of other persons (*c*).

Rights of other parties taken into consideration.

The construction of a covenant or a contract is a pure question of law. There is no equitable construction of a covenant or contract as distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to the instrument (*d*). The intention of the parties is to be collected from the language of the instrument,

Construction of covenants.

(*x*) *Besant v. Wood*, 12 C. D. 627, 628, per Jessel, M. R.

(*y*) *Besant v. Wood*, 12 C. D. 605.

(*z*) *Jackson v. Winifrith*, 47 L. T. 243.

(*a*) *Western v. M'Dermott*, 2 Ch. 72; *Chitty v. Bray*, 48 L. T. 862, W. N. (1883) 98.

(*b*) *Duke of Northumberland v. Bowman*, 56 L. T. 773.

(*c*) *Hope v. Corporation of Gloucester*, 1 Jur. N. S. 320. See *Maythorne v. Palmer*, 11 Jur. N. S. 230.

(*d*) 3 D. & J. 360, per Lord Chelmsford; *Taylor v. Corporation of St. Helen's*, 25 W. R. 885.

Chap. X.
Sect. 1.

explained by reference to the circumstances under which it was made (e), the nature of the transaction (f), and the matters to which it relates (g). The words of the instrument are to be interpreted in their ordinary grammatical sense and meaning, unless from the context of the instrument and the intention of the parties to be collected from it they appear to have been used in a different sense, or unless in their strict sense they are incapable of being carried into effect, subject however to this, that the meaning of a particular word may be shown by parol evidence to be different in some particular trade, place, or business from its proper and ordinary signification (h).

In construing a contract or a covenant the whole of the instrument is to be taken together, so as, if possible, to give effect to every part (i), and so that one of the provisions shall not be repugnant to another (k). The recitals may be made use of to explain the operative part (l). Where the words in the operative part are clear and unambiguous, they cannot be controlled by the recitals or other parts of the instrument. But if the words of the operative part are of doubtful meaning, the recitals and other parts of the instrument may be used as a test to discover the intention of the parties and to fix the meaning of those words (m).

A contract must receive such a construction as will make it lawful (n), operative (o), reasonable (p), and capable of being

(e) *Turner v. Evans*, 2 E. & B. 512; *Edinburgh, Perth, and Dundee Railway Co. v. Philipp*, 2 Macq. 514, 526; *Maclean v. Mackay*, 5 P. C. 331; *Ex parte Dawes*, 17 Q. B. D. 289.

(f) *Macintyre v. Belcher*, 14 C. B. N. S. 663, *per Erle*, C. J.

(g) *Rex v. Mashiter*, 6 A. & E. 153.

(h) *Mallan v. May*, 13 M. & W. 511; *Taylor v. Corporation of St. Helen's*, 6 C. D. 264.

(i) *Sicklemore v. Thissleton*, 6 M. & S. 9; *Rigby v. Great Western Railway Co.*, 14 M. & W. 811; *Graveley v. Burnard*, 18 Eq. 522.

(k) *Browning v. Wright*, 2 Bos. &

P. 13; *Briggs v. Earl of Oxford*, 5 De G. & S. 156.

(l) *Payler v. Homersham*, 4 M. & S. 423; *Lampon v. Corke*, 5 B. & Ald. 606.

(m) *Walsh v. Trevanion*, 15 Q. B. 751; *Ex parte Dawes*, 17 Q. B. D. 287.

(n) *Sterry v. Clifton*, 9 C. B. 110. See *Shore v. Wilson*, 9 Cl. & Fin. 397.

(o) *Broom v. Batchelor*, 1 H. & N. 255; *Mare v. Charles*, 5 E. & B. 981; *Oriental Steamship Co. v. Tyler*, (1893) 2 Q. B. 518, 527 (C. A.); and see *post*, p. 366.

(p) *Braunstein v. Accidental Death*

carried into effect, if it can be done without doing violence to its terms. But the language of a contract cannot be perverted in order to make it lawful (*q*); nor can an unreasonable stipulation be rejected if it was clearly the intention of the parties that it should form part of the contract (*r*).

Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation and effect are to be governed (*rr*).

Conditions not expressed will not be imported into an agreement, unless there is something in the agreement which shows that the parties must have intended such conditions. There must be words in the instrument capable of sustaining the meaning which is sought to be implied from them (*s*). If the Court is able to collect from the language of the whole instrument taken together an agreement between the parties that a certain thing shall be done, there is sufficient to enable the Court to say that a covenant is created (*t*). It is not enough that the language may show that the parties contemplated that a particular thing might or might not be done. It must amount to a binding agreement between them that the thing shall be done (*u*). It is not competent for the Court to import a covenant which does not arise by necessary implication from the language of the instrument (*x*). When a man covenants to do a certain thing, it is necessarily implied that he will not wilfully incapacitate himself from doing it (*y*). If he enters into an

Implication of
covenants.

Insurance Co., 1 B. & S. 782; *Jones v. Gibbons*, 8 Exch. 922.

(*q*) See *Mayor of Norwich v. Norfolk Railway Co.*, 4 E. & B. 397.

(*r*) *Stadhard v. Lee*, 3 B. & S. 364.

(*rr*) *Spurrier v. La Cloche* (1902) A. C. 446.

(*s*) *Churchward v. Reg.*, L. R. 1 Q. B. 195, 211; *Midland Railway Co. v. London and North Western Railway Co.*, 2 Eq. 525; *Maclean v. Mackay*, L. R. 5 P. C. 333.

(*t*) *Rigby v. Great Western Railway Co.*, 14 M. & W. 815; *James v.*

Cochrane, 7 Exch. 170, 177; *Great Northern Railway Co. v. Harrison*, 12 C. B. 576, 609; *Iven v. Elwes*, 3 Drew. 34; *Brooks v. Jennings*, L. R. 1 C. P. 476.

(*u*) *Aspdin v. Austin*, 5 Q. B. 671, 683; *Rashleigh v. South Eastern Railway Co.*, 10 C. B. 612; *James v. Cochrane*, 7 Exch. 177.

(*x*) *Ib.*; *Iven v. Elwes*, 3 Drew. 25; *Warne v. Routledge*, 18 Eq. 500; *Gearns v. Baker*, 10 Ch. 355.

(*y*) *M'Intyre v. Belcher*, 14 C. B. N. S. 654; *Manchester Ship Canal*

Chap. X.
Sect. 1.

Implication of
covenants.

Plan, if referred
to, read along
with the
agreement.

arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative (z).

But a man who has expressly covenanted to perform certain acts cannot be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of his express covenant (a). If A. demises land to B. and covenants not to demise the adjoining land for the purpose of carrying on a certain business, and afterwards demises part of the adjoining land to C. taking a covenant from C. not to carry on such business, but C. nevertheless carries on the same, B. cannot compel A. to enforce the covenant entered into by C. (b).

Stipulations which are necessary to make a contract reasonable (d), or conformable to usage (e), are implied in respect of matters concerning which the contract manifests no contrary intention (f). Where the contract as expressed in writing would be futile and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual (g).

A plan, if referred to by an instrument, must be read along with it and be looked to for the purpose of explaining it (h). But the mere exhibition of a plan does not amount to a representation or warranty that all the ground exhibited in the plan shall be put or shall continue in the same state in which it was

Co. v. Manchester Racecourse Co., 617; *Pollock v. Stables*, 12 Q. B. (1901) 2 Ch. 37 (C. A.). See *Piggott v. Stratton*, 1 D. F. & J. 33.

(z) *Stirling v. Maitland*, 5 B. & S. 840; and see *Metropolitan Electric Supply Co. v. Ginder*, W. N. (1901) 93.

(a) *Aspdin v. Austin*, 5 Q. B. 671, 683; *Smith v. Mayor of Harwich*, 2 C. B. N. S. 651, 667.

(b) *Kemp v. Bird*, 5 C. D. 552, 978; *Ashby v. Wilson*, (1900) 1 Ch. 66.

(d) *Jones v. Gibbons*, 8 Exch. 922.

(e) *Field v. Lelean*, 6 H. & N.

617; *Pollock v. Stables*, 12 Q. B. 765; *Dale v. Humfrey*, El. Bl. & El. 1004.

(f) *Hutton v. Warren*, 1 M. & W. 475.

(g) *Oriental Steamship Co. v. Tyler*, (1893) 2 Q. B. 518, 527 (C. A.); *Holford v. Acton Urban Council*, (1898) 2 Ch. pp. 246, 248.

(h) *Clarke v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 1 J. & H. 631; *Nicholson v. Rose*, 4 D. & J. 10; *Re Birmingham District Land Co. and Allday*, (1893) 1 Ch. 342.

exhibited upon the plan (i). The case however is different, if the plan has been made distinctly and expressly a part of the agreement (k).

Chap. X.
Sect. 1.

Persons taking by assignment from a covenantee may enforce their rights against the assigns of the covenantor without bringing the original covenanting parties before the Court, even where the covenant does not run with the land (l). A person having only an *interesse termini* cannot maintain an action on a covenant for quiet enjoyment (m).

Every covenant the benefit of which runs with the land at law, must have been originally entered into with a covenantee who at the time had an interest in the land to which the covenant refers, and must touch or concern that land. But it is a question of intention in each case to be determined on the construction of the particular document and with due regard to the nature of the covenant and the surrounding circumstances, whether the benefit of a covenant which possesses the above-mentioned characteristics does in fact run with the land (n).

The original covenantor is not a proper party to an action to restrain an assignee of the lease from violating a covenant in the lease, if he has parted with all interest in the property and is not in any way in fault (o).

Nor should a lessee of land, subject to a restrictive covenant, who grants an underlease of the premises containing a similar covenant on the part of the underlessee, be made a party to an action by the lessor against the underlessee for breach of the restrictive covenant, if there is no evidence to show that he has been privy to or sanctioned the breach of the covenant by the underlessee (p). But where a man has been instrumental in

(i) *Fcoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301; *Squire v. Campbell*, 1 M. & C. 485; *Fewster v. Turner*, 11 L. J. Ch. 161; *Tucker v. Vowles*, (1893) 1 Ch. 195. See *Eastwood v. Lever*, 4 D. J. & S. 114.

(k) *Rankin v. Huskisson*, 4 Sim. 15; *Slee v. Corporation of Bradford*, 4 Giff. 262.

(l) *Child v. Douglas*, Kay, 577, per Lord Hatherley; but see *Muller*

v. Trafford, (1901) 1 Ch. 54.

(m) *Wallis v. Hands*, (1893) 2 Ch. 75.

(n) *Rogers v. Hosegood*, (1900) 2 Ch. pp. 395, 396.

(o) *Clements v. Welles*, 1 Eq. 200; *Fielden v. Slater*, 7 Eq. 527; *Bowes v. Law*, 9 Eq. 636. Comp. *Evans v. Davies*, 10 C. D. 747; comp. also *Ashby v. Wilson*, (1900) 1 Ch. 66.

(p) *Hall v. Ewin*, 37 C. D. 80.

Chap. X.
Sect. 1.

leading another to commit a breach of covenant, he may be rightly made a party to an action to restrain the breach (g).

Where a lessee enters into a restrictive covenant for himself and assigns, and sublets to a tenant who commits a breach of the covenant, no action lies against the lessee, since the subtenant is not an assign within the meaning of the covenant (r).

Parties.

Although several persons may be entitled to complain of a breach of covenant, one alone of such persons may maintain the action; the others need not be parties to or be represented in the action. Where, for example, a vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, neither reserving any interest nor entering into any covenant himself, the owner of any one lot for the time being may enforce the covenant in equity against the owner of any other lot. The owners of the other lots are not necessary parties to an action by one of them to restrain the breach of covenant (s). A mortgagee who is a covenantee and his assigns may bring an action to enforce the covenant (t). So also a mortgagor in receipt of the rents and profits has sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee (u). Tenants in common assignees of the reversion of a lease may join in suing or be jointly sued on the covenants therein (x).

Where there are mutual covenants by owners of land their heirs and assigns with the owners of adjoining land their heirs and assigns to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign and can enforce the same (y).

(g) *Tritton v. Bankhart*, 35 W. R. 474, W. N. (1887) 53.

(r) *Bryant v. Hancock*, (1898) 1 Q. B. 716, aff. (1899) A. C. 442, on the ground that there had been no breach.

(s) *Western v. M'Dermott*, 2 Ch. 72; *Harrison v. Goode*, 11 Eq. 349; *Lord Manners v. Johnson*, 1 C. D. 681.

(t) *Lord Manners v. Johnson*, 1 C. D. 680.

(u) *Fairclough v. Marshall*, 4 Exch. D. 48; and see *Judicature Act*, 1873, s. 25, sub-s. (5). See also *Van Gelder v. Sowerby Bridge, &c., Society*, 44 C. D. 374, 394 (C. A.).

(x) *Womersley v. Daley*, 26 L. J. Ex. 219.

(y) *Taitte v. Gosling*, 11 C. D. 273.

The assignee of a lessee is liable in covenant and entitled to bring an action for breach of covenant, although assigns are not named in the covenant (z). The Statute 32 Hen. VIII. c. 34 has placed the assignee of a reversioner on the same footing in this respect as the assignee of a lessee, and gives to reversioners the benefit of covenants entered into with their predecessors in title if and so far as they run with the land (a).

Chap. X.
Sect. 1.

Reversioner
may sue.

The successive reversioners, as they become entitled to the estate, have a right to insist upon the performance of the covenants irrespectively of the damage which may accrue from the breach (b). But reversioners who are not the immediate reversioners expectant upon a lease, but entitled merely in remainder, are precluded from suing, unless they can prove special damage to themselves in respect of their interest in the reversion (c). Courts of equity in interfering at the suit of reversioners in remainder to restrain breaches of covenant, follow the analogy of the rule at law, and will not grant injunctions unless material damage has been shown (d). Thus in the case where the reversioner of a leasehold house held under a lease for 999 years (the tenant for life of the reversion not being a plaintiff) sought to restrain the lessee from keeping a school contrary to a covenant in the lease which stipulated that no trade or business whatever should be carried on in the house, but that it should be used simply as a dwelling-house, Lord Hatherley refused to grant an injunction on the ground that the damage was too minute for the Court to interfere. The case would have been different had the lessee been carrying on a noxious or offensive trade (e).

In an action by an assignee of the reversion for breach of

(z) *White v. Southend Hotel Co.*, (1897) 1 Ch. 767; *John Brothers v. Holmes*, (1900) 1 Ch. 188; *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608.

(a) *Fleetwood v. Hall*, 23 Q. B. D. 35; *Clegg v. Hands*, 44 C. D. 503; *Birmingham Breweries Co. v. Jameson*, 67 L. J. Ch. 403; *Muller v. Trafford*, (1901) 1 Ch. 54.

(b) *Isherwood v. Oldknow*, 3 M. & S. 382.

(c) *Mumford v. Oxford, &c., Railway Co.*, 1 H. & N. 34; *Simpson v. Savage*, 1 C. B. N. S. 349; *Cooper v. Crabtree*, 19 C. D. 196.

(d) *Johnstone v. Hall*, 2 K. & J. 423.

(e) *Ib.*

Chap. X.
Sect. 1.

Statement of
claim in action
by reversioner.

Varieties of
covenants.

Injunction to
restrain breach
of negative
covenants.

covenant in a lease, the statement of claim must allege the nature of the deeds and documents by which the plaintiff became such assignee so as to be entitled to sue under 32 Hen. VIII. c. 34 (f).

Covenants are either of an affirmative or negative nature. Where a man covenants that something has been done or shall be done hereafter, the covenant is affirmative. Where a man covenants that a thing has not been done or shall not be done hereafter, the covenant is a negative one. In cases where the covenant is affirmative, the remedy in equity is by way of specific performance. If the covenant is a negative one, the remedy is by way of injunction.

In restraining by injunction the breach of a negative covenant, the interference of the Court is in effect an order for specific performance. "An agreement," said Lord St. Leonards in *Lumley v. Wagner* (g), "may be as effectually performed in this way as by an order for the performance of the thing to be done." "If there is a negative covenant," said Lord Cairns in *Doherty v. Alman* (h), "the Court has no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say by way of injunction that the thing shall not be done. In such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience or of the amount of damage or injury, it is the specific performance by the Court of that negative bargain which the parties have made with their eyes open between themselves." Persons accordingly who had entered into a covenant not to ring church bells at stated periods and had accepted the benefits of the covenant were restrained from violating its obligations (i). So also an author who on the sale of a work had covenanted with the purchaser not to publish a work of the like nature, or do anything which

(f) *Davies v. James*, 53 L. J. Ch. 523.

(g) 1 D. M. & G. 615.

(h) 3 App. Ca. 720. See *McEacharn v. Colton*, (1902) A. C. 104.

(i) *Martin v. Nutkin*, 2 P. W. 266.

might be detrimental to the sale or publication of that work, was restrained from publishing a rival work on the same subject (*k*). So also an agreement between a publisher and an author that the latter should write a tale for the former and should not during the continuance of the agreement write for any other publication, was enforced by injunction, so far as regards the negative part of the stipulation (*l*).

Chap. X.
Sect. 1.

So also tenants were restrained from having more than two grain crops in any five years of the term (*m*), from breaking up pasture land (*n*), and from removing straw or green crops from a farm (*o*), contrary to covenants in their lease (*p*). So also a man who had covenanted not to perform or write for any other than a particular theatre, was restrained according to the terms of the covenant (*q*). So also a public body (*qq*) was restrained from erecting buildings on a plot of land, opposite a club-house, contrary to agreement (*r*). So also the lessee of a mine who had covenanted not to remove machinery from a mine was restrained according to the terms of the covenant (*s*). So also where the lessee of trade premises has entered into a covenant to deliver up at the end of the term all the fixtures which were or should be at any time during the term affixed to the freehold, he will be restrained from removing trade fixtures (*t*). So also a railway company which had bought land from a man, and had covenanted with him in the purchase deed not to erect any building upon it to a greater height than eighteen feet within the distance of

Injunction to
restrain breach
of negative
covenants.

(*k*) *Barfield v. Nicholson*, 2 Sim. & St. 1, 2 L. J. Ch. 90; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Ainsworth v. Bentley*, 14 W. R. 630, W. N. (1866) 117.

(*l*) *Stiff v. Cassell*, 2 Jur. N. S. 348.

(*m*) *Fleming v. Snook*, 5 Beav. 252.

(*n*) *Grey de Wilton v. Saxon*, 6 Ves. 106.

(*o*) *Lybbe v. Hart*, 29 C. D. 8, 54 L. J. Ch. 863. See *ib.*, as to trustee in bankruptcy or in liquidation of bankrupt lessee.

(*p*) See, as to covenants in a farming lease, *Gale v. Bates*, 3 H. & C. 84; *Meux v. Copley*, (1892) 2 Ch. 253.

(*q*) *Morris v. Colman*, 18 Ves. 437.

(*qq*) *The Commissioners of Woods and Forests*.

(*r*) *Rankin v. Huskisson*, 4 Sim. 13.

(*s*) *Hamilton v. Dunsford*, 6 Ir. Ch. 412.

(*t*) *Bidler v. Trinidad Petroleum Co.*, W. N. (1868) 268, 17 W. R. 153.

Chap. X.
Sect. 1.

Injunction to
restrain breach
of negative
covenants.

eighty feet from certain other property of his, was restrained according to the terms of the covenant (*u*). So also a railway company was restrained from removing from the railway carriages placards and advertisements of the plaintiff, and from removing from the stations the book-stalls of the plaintiff, contrary to covenant (*x*). So also the lessee of a coal mine who had covenanted not to remove pillars of coal in working the mine was restrained according to the terms of his covenant (*y*).

So also a man who had purchased land under a condition prohibiting building thereon except after permission obtained, was restrained from building before obtaining the permission required (*z*). So also the purchaser of a plot of ground under covenant not to build more than one house thereon will be restrained from erecting a block of residential flats (*a*). So also a person under covenant to use a house as a "private residence" only will be restrained from using it as a block of flats (*b*), or from receiving as lodgers the pupils of a neighbouring school (*c*). So also the lessee of a house who had covenanted not to carry on any business or trade on the demised premises, was restrained from setting up a school (*d*), from carrying on the trade or business of a baker, confectioner, beershop keeper (*e*), hairdresser (*f*), or auctioneer (*g*), from

(*u*) *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 568.

(*x*) *Holmes v. Eastern Counties Railway Co.*, 3 K. & J. 675.

(*y*) *Taylor v. Mostyn*, 23 C. D. 584.

(*z*) *Att.-Gen. v. Briggs*, 1 Jur. N. S. 1084; *Haigh v. Waterman*, W. N. (1867) 150; *De Nichols v. Abel*, W. N. (1869) 14; but see *Everett v. Remington*, (1892) 3 Ch. 148.

(*a*) *Rogers v. Hosegood*, (1900) 2 Ch. 388 (C. A.); but see *Kimber v. Admans*, (1900) 1 Ch. 412.

(*b*) *Rogers v. Hosegood*, (1900) 2 Ch. 388 (C. A.).

(*c*) *Hobson v. Tulloch*, (1898) 1 Ch. 424.

(*d*) *Kemp v. Sober*, 1 Sim. N. S.

520, on appeal, 19 L. T. O. S. 308; *Johnstone v. Hall*, 2 K. & J. 423; *Wickenden v. Webster*, 6 E. & B. 387; *German v. Chapman*, 7 C. D. 271. A covenant by a purchaser of building land not to do or suffer anything to be done on the premises which should be a "nuisance" to purchasers of other lots, is not broken by establishing a school: *Harrison v. Good*, 11 Eq. 338; but see *Wauton v. Coppard*, (1899) 1 Ch. 92, where the covenant was not to carry on any business "whereby any injurious or offensive or disagreeable noise or nuisance" should be occasioned.

(*e*) *Hodson v. Coppard*, 29 Beav. 4.

(*f*) *Clements v. Welles*, 1 Eq. 200.

(*g*) *Parker v. Whyte*, 1 H. & M.

converting the premises into an hospital and receiving patients who made small payments according to their

Chap. X.
Sect. 1.

167. See *Moses v. Taylor*, 11 W. R. 81. Comp. *Reeves v. Cattell*, 24 W. R. 485. A covenant not to use a house as a shop may be broken by user of it for the sale of goods without any structural or architectural alteration of the house: *Wilkinson v. Rogers*, 2 D. J. & S. 62. A covenant not to carry on the trade of a butcher is broken by selling raw meat, though it was not exposed in the shop windows, but was visible to passers by if they looked in: *Doe v. Spry*, 1 B. & Ald. 617. A covenant not to use a building as a "public-house for sale of beer, wine, malt liquor, or spirits," is not broken by taking out an ordinary excise licence, for the sale of beer not to be drunk on the premises: *Pease v. Coats*, 2 Eq. 688; *London and North Western Railway Co. v. Garnett*, 9 Eq. 26. See *Marks v. Benjamin*, 5 M. & W. 565. Nor is a covenant not to use a house as a public-house, tavern or beerhouse broken by opening a grocer's shop there at which beer is sold to be drunk off the premises as ancillary to the grocer's business: *Holt & Co. v. Collyer*, 16 C. D. 718. But a covenant not to use a house as a beer-shop is broken by taking out a licence to sell beer not to be drunk on the premises and selling it there accordingly: *Bishop of St. Albans v. Battersby*, 3 Q. B. D. 359; *London and Suburban Land, &c., Co. v. Field*, 16 C. D. 645. See as to distinction between beer-shop and beerhouse, *ib.*: *Nicholl v. Fenning*, 19 C. D. p. 267. See as to covenant by tenant of a public-house with his landlord (a brewer) to purchase from him all the beer to be consumed on the

premises: *Edwick v. Hawkes*, 18 C. D. 199; *Clegg v. Hands*, 44 C. D. 503 (C. A.); *Manchester Brewery Co. v. Coombe*, (1901) 2 Ch. 608. The burden of a covenant by a lessee not to buy or sell on the demised premises any wines other than wines purchased from the lessor, his successors or assigns, runs with the land, although assigns are not named: *White v. Southend Hotel Co.*, (1897) 1 Ch. 767 (C. A.). A covenant not to use a shop "for the sale of spirituous liquors" is broken by the sale of spirituous liquors in bottle, but is not broken by the sale of wines in bottle: *Fielden v. Slater*, 7 Eq. 523; but see *Stuart v. Diplock*, 43 C. D. 343; nor by the sale of wine and spirits in bottle by a grocer in the course of his business: *Jones v. Bone*, 9 Eq. 674; but see *Buckle v. Fredericks*, 44 C. D. 244. See as to the trade of a vintner, *Wells v. Attenborough*, 19 W. R. 466. A covenant not to carry on the business of a horse-hair manufacturer is not broken by merely dealing in horsehair: *Harms v. Parsons*, 32 Beav. 328. A covenant not to carry on the business of a wholesale or retail confectioner is not broken by the sale by a grocer and tea dealer of a particular kind of sweetmeat in which a confectioner may happen to deal: *Lumley v. Metropolitan Railway Co.*, 34 L. T. 774. The trade of a coachmaker does not fall within the provisions of a covenant against carrying on an offensive trade: *Bonnett v. Sadler*, 14 Ves. 525. See *Moses v. Taylor*, 11 W. R. 81, as to whether the setting up a mock auction is an offensive trade

Chap. X.
Sect. 1.

Injunction
against breach
of negative
covenants.

means (*h*), and from setting up a charitable institution called Home for Working Girls where the inmates were received upon payment of a small sum for board and lodging from which no profit was derived (*i*).

So also where a lessee entered into a covenant not to affix or permit any outward mark or show of business to be affixed on the demised premises, he was restrained from doing acts in breach of the covenant (*k*). So also where a man had covenanted not to carry on a retail business as a chemist, druggist and soda water manufacturer, he was restrained from selling single bottles (*l*). So also a lessee who had covenanted not to suffer anything to be done on the premises to the annoyance of the lessor or the adjoining occupiers, was restrained from using the premises as a place of public entertainment (*m*).

So also a man who had covenanted in a separation deed not to molest his wife, was restrained according to the terms of his covenant (*n*). So also an injunction was granted to restrain a wife in accordance with the covenants in a separation deed from molesting her husband and taking any action or other proceeding for the purpose of compelling him to cohabit with her (*o*). So also an injunction was granted to

within the meaning of the covenant. Nor is the opening of a house as a public-house a breach of covenant not to carry on a trade or business that might be offensive, or an annoyance, or disturbance, to any of the tenants of the lessor or any part of the neighbourhood: *Jones v. Thorne*, 1 B. & C. 716. See *Gorton v. Smart*, 1 Sim. & St. 66; *Hickman v. Isaacs*, 4 L. T. 285. The keeping a lunatic asylum is not carrying on an offensive trade, *Doe d. Wetherell v. Bird*, 2 A. & E. 161. See *Moses v. Taylor*, 11 W. R. 81. Nor is the carrying on of the business of a laundryman, see *Knight v. Simmonds*, (1896) 1 Ch. p. 661. See as to what amounts to breach of covenant in a building lease, *Schreiber v. Creed*, 10 Sim. 9;

Patching v. Dubbins, Kay, 1; *Child v. Douglas*, ib. 560; *Bowes v. Law*, 9 Eq. 636; *Russell v. Baber*, 18 W. R. 1021. A covenant may be broken by permitting acts of a third party in contravention of it: *Borgins v. Edwards*, 2 F. & F. 111, 113.

(*h*) *Bramwell v. Lacy*, 10 C. D. 691.

(*i*) *Rolls v. Miller*, 27 C. D. 71.

(*k*) *Evans v. Davies*, 10 C. D. 747.

(*l*) *Treacher v. Treacher*, W. N. (1874) 4.

(*m*) *Collins v. Slade*, W. N. (1874) 205.

(*n*) *Sanders v. Rodway*, 16 Beav. 211. See *Hunt v. Hunt*, 4 D. F. & J. 221; *Cahill v. Cahill*, 8 App. Ca. 421.

(*o*) *Besant v. Wood*, 12 C. D. 605.

restrain the publication of the recovery of a judgment debt against a man contrary to agreement, where the threat to sell the judgment debt by auction was not *bonâ fide* but for the purpose of getting better terms (*p*).

So also the Court will enforce by injunction a covenant in a lease not to assign without the lessor's consent. Such a covenant runs with the land, and is broken even where an assignee of the lease assigns to the original lessee, and an injunction will lie to restrain such assignment (*q*). But a mere licence to use the premises is not a breach of such a covenant (*r*). Where a lessee has covenanted not to assign or underlet without the lessor's consent, such consent not to be unreasonably withheld, the lessee cannot maintain an action for an injunction to restrain the lessor from unreasonably withholding his consent, but can assign or underlet in spite of such refusal (*s*). But the lessee cannot justify the omission to apply for the lessor's consent (*t*).

If the covenant is vague or uncertain in its terms, or of such a nature that the Court cannot, consistently with its rules and principles, enforce it, an injunction will not be granted (*u*). Thus the Court would not enforce by injunction a covenant not to build, except so as to be an ornament rather than otherwise to the adjoining property (*x*).

A class of negative covenants which the Court will enforce by injunction are covenants in partial restraint of trade, where the limitation is reasonable. Covenants in total restraint of

A covenant may be too vague to be enforced by injunction.

Covenants in restraint of trade.

See *Marshall v. Marshall*, 5 P. D. 19; *Clark v. Clark*, 10 P. D. 188. As to what amounts to molestation, see *Fearon v. Aylesford*, 14 Q. B. D. 792 (C. A.); *Hunt v. Hunt*, (1897) 2 Q. B. 547 (C. A.).

(*p*) *Jamieson v. Teague*, 3 Jur. N. S. 1206.

(*q*) *McEacharn v. Colton*, (1902) A. C. 104.

(*r*) *Daly v. Edwards*, 83 L. T. 548 (C. A.); 18 T. L. R. 169.

(*s*) *Sear v. House Property, &c., Society*, 16 C. D. 387; *Treloar v. Bigge*, L. R. 9 Ex. 151; and see

Bates v. Donaldson, (1896) 2 Q. B. 241 (C. A.). As to what is an unreasonable refusal, see *Sheppard v. Hong-Kong, &c., Banking Co.*, 20 W. R. 459, W. N. (1872) 68; *Bates v. Donaldson*, (1896) 2 Q. B. 241 (C. A.).

(*t*) *Barrow v. Isaacs*, (1891) 1 Q. B. 417 (C. A.); *Eastern Telegraph Co. v. Dent*, (1899) 1 Q. B. 835 (C. A.).

(*u*) *Ante*, p. 360.

(*x*) *Mann v. Stephens*, 15 Sim. 379.

Chap. X.
Sect. 1.

trade are absolutely void upon grounds of public policy (*y*). "The law," said Lord Wynford, in *Homer v. Ashford* (*z*), "will not permit anyone to restrain a man from doing what his own interest and the public welfare require that he should do. Any deed therefore by which a man binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void (*a*)."

Notwithstanding the older cases, however, it seems to be now settled that a restraint, however general, will be good if it is under the circumstances reasonable (*b*); and on the other hand a restraint, however limited, will be bad if unreasonable. The old rule that all covenants in restraint of trade are *prima facie* contrary to public policy and void, seems to be no longer in force, and such a covenant will only be invalid as being injurious to public interests if some specific ground for so holding it can be clearly established (*c*). But it does not necessarily follow in all cases that such a restraint, though valid, will be enforced by injunction. A covenant by a servant that he will not during the engagement carry on a business similar to his employer's, "or any other business whatever," is legal, although the Court will not enforce it by injunction (*d*).

Covenants in
partial restraint
of trade.

Covenants in partial restraint of trade, where there is a fair and reasonable ground for the restriction, are good and valid, and the onus lies on the covenantor to prove that the restraint goes beyond what was reasonably necessary (*e*). Such covenants are upheld, not because they are advantageous to the

(*y*) *Mitchell v. Reynolds*, 1 P. Wms. 181; *Mallan v. May*, 11 M. & W. 665; *Collins v. Locke*, 4 App. Ca. 674; *Davies v. Davies*, 36 C. D. 359.

(*z*) 3 Bing. 328.

(*a*) *Ward v. Byrne*, 5 M. & W. 548; *Hinde v. Gray*, 1 M. & G. 195. See *Alsopp v. Wheatcroft*, 15 Eq. 64. But see *Rousillon v. Rousillon*, 14 C. D. 369, where Fry, L. J., said that the cases in which an unlimited prohibition as to space have been spoken of as void related only to circumstances in which such a pro-

hibition has been unreasonable; and see *Maxim-Nordenfelt, &c., Co. v. Nordenfelt*, (1894) A. C. 535.

(*b*) *Maxim-Nordenfelt, &c., Co. v. Nordenfelt*, (1894) A. C. 535; *Underwood v. Barker*, (1899) 1 Ch. 300 (C. A.).

(*c*) *Underwood v. Barker*, (1899) 1 Ch. 300 (C. A.); but see the judgment of Vaughan Williams, L. J. in this case.

(*d*) *Robinson v. Heuer*, (1898) 2 Ch., pp. 455, 456.

(*e*) *Haynes v. Doman*, (1899) 2 Ch. 13.

individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Such restraints upon trade, so far from being injurious to trade, are in many cases necessary for the protection of those who are engaged in it. Instead of cramping, they encourage the employment of capital, and the promotion of industry (*f*). Such is the case of the disposal or sale of the goodwill of a trade or business, carried on in a particular locality, where the vendor covenants and agrees not to carry on the same business in the same place (*g*), or not to carry on a business under a particular name or style in trade (*h*), or the taking an apprentice, clerk, traveller, or servant upon the terms that he shall not, during or after the termination of his engagement, solicit custom from his master's customers (*i*), or set up the same trade, business, or profession in opposition to his employer, in his immediate neighbourhood, or in the district over which the master's business extends (*k*); or the dissolution of a partnership on the retirement of one of the partners of a firm upon the terms and subject to an agreement that he will not at any time set up business in opposition to the remaining partners, or any new partners or their assignees, in the district where the business is carried on (*l*).

A man who has covenanted not to carry on business in his own name, or for his own benefit, or in the name of or for the benefit of any other person within a certain district, is not

Construction and
effect of such
covenants.

(*f*) *Mallan v. May*, 11 M. & W. 665; *Mumford v. Gething*, 7 C. B. N. S. 319; *Leather Cloth Co. v. Lonsont*, 9 Eq. 354.

(*g*) *Archer v. Marsh*, 6 A. & E. 959; *Wallis v. Day*, 2 M. & W. 273; *Clarkson v. Edge*, 33 Beav. 227.

(*h*) *Vernon v. Hallam*, 34 C. D. 748.

(*i*) *Nicholls v. Stretton*, 7 Beav. 42, 10 Q. B. 346; *Mumford v. Gething*, 7 C. B. N. S. 305; *Alsopp v. Wheatcroft*, 15 Eq. 64; *Musselwhite v. Spicer*, W. N. (1879) 74; *Haynes v. Doman*, (1899) 2 Ch. 13

(C. A.).

(*k*) *Mallan v. May*, 11 M. & W. 668; *Sainter v. Ferguson*, 7 C. B. 716, 1 Mac. & G. 286; *Benwell v. Inns*, 24 Beav. 310; *Gravelly v. Barnard*, 18 Eq. 518; *Cornwall v. Hawkins*, 41 L. J. Ch. 435, W. N. (1872) 97, where the covenant enforced was entered into whilst the defendant was an infant; *East v. Whitney*, W. N. (1877) 80. Comp. *King v. Hansell*, 5 H. & N. 106.

(*l*) *Leighton v. Wales*, 3 M. & W. 545; *Price v. Green*, 16 M. & W.

prevented from soliciting orders within the district for a third person who is carrying on business beyond the district (*m*), but he may not solicit orders for his own benefit within the prescribed limits, though he has no residence, shop, or place of business within them (*n*), or send goods to places within the prescribed limits from a place beyond them, where he is carrying on business (*o*). So also a covenant by the vendor on the sale of a medical practice not to solicit any patients within a certain radius, or otherwise directly or indirectly to enter into competition with the purchaser, is not confined to active competition, but is broken by the vendor coming into the defined area and attending patients there (*p*).

A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, a particular business, or sell any goods in any way connected with that business is broken by selling goods as a journeyman in the employment of a person carrying on that business (*q*). So also an agreement by a man not to carry on a particular business, directly or indirectly, either alone or in partnership with or with the assistance of any other person is broken by his carrying it on as manager to another person (*r*). So also a covenant by a clerk not to carry on business as a surgeon within certain limits is broken by his acting as assistant to a surgeon (*s*). But an agreement by a man not to carry on a particular trade either in his own name or in that of any other person is not broken by his carrying it on as manager to another person at a fixed salary (*t*). Nor is a man who has covenanted not to "travel for any porter, ale, or spirit merchant as agent, collector, or otherwise," pre-

346; *Tallis v. Tallis*, 1 E. & B. 391. See, also, as to covenants not being too general, *Gale v. Reed*, 8 East, 80; *Wickens v. Evans*, 3 Y. & J. 318; *Jones v. Lees*, 1 H. & N. 189.

(*m*) *Clarke v. Watkins*, 9 Jur. N. S. 142.

(*n*) *Turner v. Evans*, 2 E. & B. 512, 2 D. M. & G. 740.

(*o*) *Brampton v. Beddoes*, 13 C. B. N. S. 538.

(*p*) *Rogers v. Drury*, 57 L. J. Ch. 502.

(*q*) *Jones v. Heavens*, 4 C. D. 636. See *Newling v. Dobbell*, 38 L. J. Ch. 111; *Hill & Co. v. Hill*, 35 W. R. 137.

(*r*) *Dales v. Weaver*, 18 W. R. 993; *Baxter v. Lewis*, 81 L. T., pp. 295, 354.

(*s*) *Palmer v. Mallett*, 36 C. D. 411.

(*t*) *Allen v. Taylor*, 19 W. R. 35, 557.

cluded from entering into the service of a brewer as traveller (*u*). A covenant not to be engaged in a specified trade or "in any way, matter, or thing whatsoever, in anywise relating thereto," within a given district does not prevent the covenantor from lending money to a person engaged in such trade within the district, upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business, but he may not retain any direct hold on the profits of the business (*x*). In a recent case, the defendant upon becoming manager of a branch of the plaintiffs' business, situate in Regent Street, covenanted that he would not, after the determination of his engagement, set up "or become interested in," either directly or indirectly, a similar business within a distance of twenty miles from Regent Street. The plaintiffs dismissed the defendant, who thereupon accepted employment with a competing firm in Regent Street at a salary of £2 a week but without commission or other interest in the success of the business. Upon application for an injunction it was held that there had been no breach of the covenant (*y*).

The death or discontinuance from business of the covenantee does not release the covenantor from the obligations of the covenant (*z*). Nor is the covenant affected by the removal of the business to another shop near at hand (*a*). The benefit of the covenant passes to an assign either of the goodwill or of the beneficial interest in the business (*b*), and the agreement may be enforced by the assign, although assigns are not expressly mentioned in the covenant (*c*).

(*u*) *Josselyn v. Parson*, L. R. 7 Ex. 129. *per* Lord Wensleydale; *Atkins v. Kinneir*, 4 Exch. 782; *Jacoby v. Whitmore*, 32 W. R. 18, 49 L. T. 335; *Baines v. Geary*, 35 C. D. 154.

(*x*) *Bird v. Lake*, 1 H. & M. 338.

(*y*) *Gophir Diamond Co. v. Wood*, (1902) 1 Ch. 950. See, further, as to the meaning of the words "interested in" in such a covenant, *Smith v. Hancock*, (1894) 2 Ch. p. 386.

(*z*) *Hitchcock v. Coker*, 6 A. & E. 438; *Elves v. Crofts*, 10 C. B. 241; *Hastings v. Whittey*, 2 Exch. 615,

(*a*) *Jacoby v. Whitmore*, 32 W. R. 18, 49 L. T. 335.

(*b*) *Jacoby v. Whitmore*, *ante*; *Townsend v. Jarman*, (1900) 2 Ch. 698.

(*c*) 49 L. T. 335; and cf. *White v. Southend Hotel Co.*, (1897) 1 Ch. 767 (C. A.). Where a covenant in

Benefit of
covenant passes
with goodwill.

Chap. X.
Sect. 1.

Restriction—
when reasonable.

If the area of exclusion is larger than the protection of the party with whom the covenant is made can possibly require, such covenant is unreasonable, and void (*d*). The rule upon the subject has been thus laid down by Tindal, C. J., in *Horner v. Graves* (*e*): "We do not see how a better test can be applied to the questions, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public" (*f*). The fact that the area of exclusion may be apparently larger than the area of the business of the party insisting on the contract, is not a reason for avoiding it (*g*). Unless the restraint is such as to be plainly and obviously unnecessary, the restraint is good (*h*). So also in *Rousillon v. Rousillon* (*i*), Fry, L. J., was of opinion that the question in each case was whether the restraint extended further than was necessary for the reasonable protection of the covenantee; and that if it did not do that, the covenant would be enforced, even though the restraint was unlimited as to space.

Covenant in
restraint of
trade—when
reasonable.

The reasonableness or unreasonableness of the restriction in respect of space depends in a great measure on the nature of the business and the mode in which it is usually carried on (*k*). No certain and precise boundary can be laid down within which the restraint would be reasonable, and beyond which it would be excessive. Some trades and professions require a limit of a much larger range than others. An area of exclusion which would be unreasonable in one trade or profession is in another necessary for its protection. Businesses, such as those of attorneys, bankers, publishers, &c., &c., which

restraint of trade is in its nature and in its true construction a personal one, it cannot be assigned, *Davies v. Davies*, 36 C. D. 359 (C. A.).

(*d*) *Hitchcock v. Coker*, 6 A. & E. 438; *Avery v. Langford*, Kay, 663.

(*e*) 7 Bing. 743.

(*f*) See *Collins v. Locke*, 4 App. Ca. 674; *Baines v. Geary*, 35 C. D. 154; *Mineral Water, &c., Protection Society*

v. Booth, 36 C. D. 465.

(*g*) *Tallis v. Tallis*, 1 E. & B. 391. See *Dendy v. Harrison*, 11 Exch. 194.

(*h*) *Horner v. Graves*, 7 Bing. 743; *Tallis v. Tallis*, 1 E. & B. 391.

(*i*) 14 C. D. 365; and see *Maxim-Nordenfelt Co. v. Nordenfelt*, (1894) A. C. 535.

(*k*) *Hitchcock v. Coker*, 6 A. & E. 439; *Avery v. Langford*, Kay, 663.

can be carried on by agents and correspondence, fill up and occupy a much wider district than those which depend for their success and proper management upon personal superintendence (l).

In *Davis v. Mason* (m), the borough of Thetford and ten miles round; in *Hayward v. Young* (n), twenty miles round a place; in *Sainter v. Ferguson* (o), a district comprising the populous town of Macclesfield and seven miles round; and in *Atkyns v. Kinneir* (p), a district comprising a radius of two and a half miles from a certain house in London, were held reasonable limits in the case of a surgeon (q).

In *Hitchcock v. Coker* (r), Taunton and three miles round was held a reasonable limit in the case of a druggist. In *Bullin v. Teece* (s), Chester and sixteen miles round, and in *Mallan v. May* (t), London was held to be a reasonable limit (u), but in *Horner v. Graves* (x), York and 100 miles round was held to be an unreasonable limit in the case of a dentist.

In the case of an attorney, London and 150 miles round was held a reasonable limit (y). In *Whittaker v. Howe* (z), Lord Langdale enforced by injunction a covenant on the part of an attorney not to practise in Great Britain for the space of twenty years (a).

In *Catt v. Tourle* (b), where the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society who

(l) *Mallan v. May*, 11 M. & W. 653; *Dendy v. Henderson*, 11 Exch. 194; *Tallis v. Tallis*, 1 E. & B. 391; *Rousillon v. Rousillon*, 14 C. D. 366.

(m) 5 T. R. 118.

(n) 2 Chitt. 407.

(o) 7 C. B. 716.

(p) 4 Exch. 776.

(q) See *Giles v. Hart*, 5 Jur. N. S. 1381; *Carnes v. Nesbitt* 7 H. & N. 778; *Fox v. Scard*, 33 Beav. 327; *Gravely v. Barnard*, 18 Eq. 521; *Palmer v. Mallett*, 36 C. D. 411.

(r) 6 A. & E. 438.

(s) 1 Set. 532, W. N. (1868) 196.

(t) 11 M. & W. 653.

(u) See as to meaning of Lon-

don, ib. 13 M. & W. 511; but see *Wallace v. Att.-Gen.*, 33 L. J. Ch. 314.

(x) 7 Bing. 735.

(y) *Bunn v. Guy*, 4 East, 190. See *Howard v. Woodward*, 34 L. J. Ch. 47; *May v. O'Neill*, W. N. (1875) 179.

(z) 3 Beav. 383.

(a) But see *Nicholls v. Stretton*, 10 Q. B. 346.

(b) 4 Ch. 654. See *Luker v. Dennis*, 7 C. D. 227; *Hanbury v. Cundy*, 58 L. T. 155; *White v. Southend Hotel Co.*, (1897) 1 Ch. 767 (C. A.); *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608.

Chap. X.
Sect. 1.

Covenants in
restraint of
trade—when
reasonable.

covenanted with him, that he should have the exclusive right of supplying beer to any public-house erected on the land, it was held that the covenant was a reasonable one and might be enforced against a member of the society, a brewer, who had acquired part of the land with notice of the covenant, and having erected thereon a public-house was supplying the same with his own beer.

In the case of a perfumer, toyman, and hair merchant, London and Westminster was held a reasonable, but London and Westminster and 600 miles round was held an unreasonable limit (*c*). In the case of a horsehair manufacturer, Birmingham and 200 miles round was held a reasonable limit (*d*). In the case of a tailor, ten miles round a circuit from Charing Cross (*e*), and twenty miles from a certain house in Cornhill were held reasonable limits (*f*). In the case of a glove manufacturer, Woodstock and its neighbourhood was held a reasonable limit (*g*). In the case of a milkman, five miles from Northampton Square, in the County of Middlesex (*h*), and three miles from Charles Street, Grosvenor Square (*i*), were held reasonable limits, and so was a covenant not to retail milk in the "neighbourhood" of a certain place (*k*). In the case of a wine and spirit merchant, a limit comprising the three counties of Carnarvon, Anglesey, and Merioneth (*l*), and Burton and 50 miles round (*m*), were held reasonable limits. In the case of an oil merchant, a radius of eight miles from the Post Office in London was held reasonable (*n*). In the case of the trade of a general merchant in a country district, a limit comprising a considerable

(*c*) *Price v. Green*, 16 M. & W. 346.

(*d*) *Hurme v. Parsons*, 32 Beav. 328.

(*e*) *Nicoll v. Beere*, 53 L. T. 659.

(*f*) *Rolfe v. Rolfe*, 15 Sim. 88; *Newling v. Dobell*, 38 L. J. Ch. 111, W. N. (1868) 269; *Wolmershausen v. O'Connor*, W. N. (1877) 113, 36 L. T. 921.

(*g*) *Daggett v. Ryman*, 16 W. R. 302, W. N. (1868) 3.

(*h*) *Proctor v. Sargent*, 2 M. & G. 20; *Musselwhite v. Spicer*, W. N. (1879) 74.

(*i*) *Benwell v. Inns*, 24 Beav. 307.

(*k*) *Stride v. Martin*, 77 L. T. 600.

(*l*) *Turner v. Evans*, 2 D. M. & G. 740.

(*m*) 56 L. T. 839.

(*n*) *Middleton v. Brown*, 47 L. J. Ch. 411, W. N. (1878) 11, 46.

section of the county of Cornwall was held reasonable (o). In the case of canvassing publishers, London and 150 miles from the Post Office, Dublin, Edinburgh, and any other town in which the covenantees might have had an establishment within six months previous to the date of the covenant, were held not unreasonable limits (p). In the case of a coaching business, a covenant not to run any coach from Reading to London was enforced by injunction (q). In the case of a carrier, a covenant not to carry goods between London and numerous towns in Norfolk was held reasonable (r), and in the case of a butcher, a limit of five miles was held reasonable (s).

A covenant, however, which restrains a man from carrying on business not merely at such place or places as the plaintiff might be practising in at the expiration of the service but at any place where he might have been practising before, though for ever so short a space of time, is unreasonable (t).

In *Mineral Water, &c., Society v. Booth* (u), the Court would not enforce by injunction a covenant in a trade society that no member of the society shall employ any outdoor servant who has left the service of another member of the society without the consent of his late employer until after the expiration of two years from his leaving such service. The case would be different if the Court was required to enforce a covenant to prevent one member of the society from injuring another by employing a servant who, from having filled a place of confidence in the service of another member, might have acquired knowledge which might be used to the detriment of his former employer.

Covenants in
restraint of
trade.

Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into this country from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power,

(o) *Avery v. Langford*, Kay, 663.

(p) *Tallis v. Tallis*, 1 E. & B. 391.

See *Mullan v. May*, 11 M. & W. 653.

(q) *Williams v. Williams*, 2 Sw.

253. See *Leighton v. Wales*, 3 M.

& W. 545.

(r) *Archer v. Marsh*, 6 A. & E.

959.

(s) *Elves v. Crofts*, 10 C. B. 241.

(t) *Mullan v. May*, 11 M. & W.

653.

(u) 36 C. D. 465.

Chap. X.
Sect. 1.

allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors, and will not communicate to any person or persons the means or process of such manufacture so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased." It was held that the restriction contained in this clause was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers and was capable of being enforced against the vendors (x).

A covenant on the dissolution of a partnership that the retiring partner shall not, if he set up a similar business, hold himself out to have been or seek to induce others to believe him to have been formerly connected in business as partner manager, or servant with the plaintiff, is not too wide, and will be enforced by injunction (y).

Nor is a covenant by a vendor of a business and the goodwill thereof that he will not carry on the business of a manufacturer for a term of years under a particular style or name void, as being in a covenant in restraint of trade, notwithstanding that it may be unlimited in point of space (z).

A covenant by the licensee of a patent not to make any of the articles, which are the subject of the patent, without the invention applied to them, is not void as in restraint of trade (a).

Measurement
of distance.

When the restraint is limited in point of space, the distance in question is to be measured in a straight line upon a horizontal plane, unless it is expressly, or by necessary implication, directed to be measured by the most practicable mode of access (b).

Divisibility
of covenant.

An agreement in restraint of trade may be divisible. Where an agreement of the sort contains a stipulation which is capable

(x) *Leather Cloth Co. v. Lonsont*, 9 Eq. 345. See *Hogg v. Darley*, 47 L. J. Ch. 567, W. N. (1878) 80; but see *Davies v. Davies*, 36 C. D. 359.
(y) *Wolmerhausen v. O'Connor*, 36 L. T. 921.

(z) *Hallam v. Vernon*, 34 C. D. 748.
(a) *Jones v. Lees*, 1 H. & N. 189.
(b) *Leigh v. Hind*, 9 B. & C. 776; *Atkyns v. Kinneir*, 4 Exch. 776; *Duignan v. Walker*, John. 446; *Mouflet v. Cole*, L. R. 8 Ex. 32.

of being construed divisibly, and one part is void, as being unreasonable, while the other is not, the latter will be upheld, and the contract will not be held void altogether (c). But the Court cannot create or carve out a new covenant for the sake of making a stipulation valid which would otherwise be void (d); and a covenant by a partner to retire from the business "so far as the law allows" is too vague for the Court to enforce (e).

Chap. X.
Sect. 1.

According to the earlier cases a covenant in restraint of trade was void, unless the consideration was adequate to the restriction; but, since *Hitchcock v. Coker* (f), it may be considered as settled at law that the adequacy of the consideration will not be inquired into, and that if there be a legal consideration of value the contract will be upheld without reference to the amount of value (g). A Court of equity may, however, at its discretion, decline to interfere where the disproportion between the restriction and the consideration is so great as to satisfy the Court that the one party has taken an unfair advantage of the other (h). The consideration need not be stated in express terms in the instrument. It is enough if it can be inferred (i).

Consideration
of contracts
in restraint
of trade.

There is not any implied covenant or promise on the part of the vendor or assignor of a business not to set up the same trade in opposition to the purchaser in the neighbourhood of the spot where the business is carried on (k), although he may not solicit his old customers (l). But where the lease of a house and the goodwill of a trade had been sold and assigned

Covenant in
restraint will
not be implied,

(c) *Mallan v. May*, 11 M. & W. 664; *Price v. Green*, 13 M. & W. 696, 16 M. & W. 346; *Nicholls v. Stretton*, 10 Q. B. 346; *Baines v. Geary*, 35 C. D. 154; *Rogers v. Maddocks*, (1892) 3 Ch. 346 (C. A.); *Dubowski v. Goldstein*, (1896) 1 Q. B. 478; *Haynes v. Doman*, (1899) 2 Ch. 13, 24.

(d) *Baker v. Hedgecock*, 39 C. D. 520.

(e) *Davies v. Davies*, 36 C. D. 359 (C. A.).

(f) 6 A. & E. 438.

(g) *Pilkington v. Scott*, 15 M. & W. 657; *Gravelly v. Barnard*, 18 Eq. 521; *Davies v. Davies*, 36 C. D. 359; *Collins v. Locke*, 4 App. Ca. p. 686.

(h) *Middleton v. Brown*, 47 L. J. Ch. 411.

(i) *Gravelly v. Barnard*, 18 Eq. 522.

(k) *Crutwell v. Lye*, 17 Ves. 346; *Trego v. Hunt*, (1896) A. C. 7.

(l) *Trego v. Hunt*, (1896) A. C. 7; see also *post*, chap. 15.

Chap. X.
Sect. 1.

upon an understanding by word of mouth that the vendor should not set up the same trade in the same street, he was restrained by injunction from infringing the oral contract (*m*). If the business of a firm has been carried on under an adopted name, a man who sells the goodwill of the business cannot set up the same business under the same name or style, but he cannot be prevented from using his own name (*n*), if he takes proper precautions to prevent the public from being misled (*o*).

except in certain cases.

Contracts with a penalty. Liquidated damages.

A sum of money is sometimes named in an instrument as payable upon the breach of a covenant. In such cases the Court has to determine whether the contract will be satisfied by the payment of the sum named in the instrument, or whether it will not: whether, in other words, the sum named was inserted by way of penalty to secure the performance of the agreement, or whether it was the intention of the parties, that the act might be done on the payment of the sum named as an equivalent. If the covenant is an absolute one, and the sum named as payable upon breach has been inserted by way of penalty to secure the performance of the covenant, the payment of the penalty does not oust the Court of its jurisdiction to prevent the doing of the act stipulated not to be done (*p*). "A penalty," said Lord Loughborough, in *Hardy v. Martin* (*q*), "is never considered in this Court as the price of doing a thing which a man has expressly agreed not to do." But if the real intent and meaning of the contract is that a man should have the power, if he chooses, to do a particular act upon the payment of a certain specified sum, the power to do the act upon the payment of the sum agreed on is part of the express contract between the parties; and the Court will neither compel him to abstain from doing it nor relieve him, if he does do it, from the payment of the sum agreed on as an equivalent (*r*).

- (*m*) *Harrison v. Gardner*, 2 Madd. 111; *Fox v. Scard*, 33 Beav. 327; 198. *Jones v. Heavens*, 4 C. D. 636;
- (*n*) *Churton v. Douglas*, John. 174. *London and Yorkshire Banking Co. v. Pritt*, 56 L. J. Ch. 987.
- (*o*) *Cash v. Cash*, W.N. (1902) 32. (*q*) 1 Cox, 26.
- (*p*) *French v. Macale*, 2 Dr. & War. 276; *Bird v. Lake*, 1 H. & M. 276; *Sainter v. Ferguson*, 1

The mere use of the terms "penalty" or "liquidated damages" in a covenant is not conclusive as to the meaning of the instrument, and does not determine the intention of the parties. Like any other question of construction, the intention is to be gathered from the nature of the agreement, and the language of the whole instrument taken together (s). If it appear from the agreement, taken as a whole, that the sum specified was not intended by the parties to be liquidated damages, it will be treated as a penalty, although the words "liquidated damages" may have been used (t). On the other hand, if the sum is not a penal sum, it will not be treated as a penalty merely because it is called so in the agreement (u). It is not material that the contract may be alternative in its form, if it appear clearly that there is essentially an agreement to do one of the alternatives (x).

Where the payment of a smaller sum is secured by a larger (y), or where the damages to arise from the breach are not uncertain, but are capable of being ascertained, as where there is a particular sum to be paid which is less than the sum named as payable upon breach, the last-named sum will be considered as a penalty (z). So, also, where an agreement contains several stipulations of various degrees of importance, the breach of all or any of which gives rise to an amount of

Where construed
as a penalty.

Mac. & G. 289; *Gerrard v. O'Reilly*, 3 Dr. & War. 414; *Ranger v. Great Western Railway Co.*, 5 H. L. C. 94; *Carnes v. Nesbitt*, 7 H. & N. 778; *Young v. Chalkley*, 16 L. T. 286.

(s) *Dimech v. Corlett*, 12 Moo. P. C. 229; *Mercer v. Irving*, El. Bl. & El. 563; *Wallis v. Smith*, 21 C. D. 249; *Willson v. Love*, (1896) 1 Q. B. 626.

(t) *Coles v. Sims*, 5 D. M. & G. 1; *Bird v. Lake*, 1 H. & M. 111; *Howard v. Woodward*, 34 L. J. Ch. 47; *Magee v. Lovell*, L. R. 9 C. P. 114; *Re Newman*, 4 C. D. 731; *London and Yorkshire Banking Co. v. Pritt*, 56 L. J. Ch. 987.

(u) *Kemble v. Farren*, 6 Bing. 141; *Jones v. Green*, 3 Y. & J. 304; *Gerrard v. O'Reilly*, 2 Dr. & War. 430; *Sainter v. Ferguson*, 7 C. B. 728; *Ranger v. Great Western Railway Co.*, 5 H. L. 119; *Carnes v. Nesbitt*, 7 H. & N. 778; *Lea v. Whitaker*, L. R. 8 C. P. 73; *Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 345.

(x) *Finch v. Earl of Salisbury*, Finch. 212.

(y) *Astley v. Weldon*, 2 Bos. & P. 346; *Aylett v. Dodd*, 2 Atk. 238; *Seton v. Slade*, 7 Ves. 273.

(z) *Reynolds v. Bridge*, 6 E. & B. 541, per Coleridge, J.; *Dickson v. Lough*, 18 L. R. I. 520; but see *Wallis v. Smith*, 21 C. D. 269.

Chap. X.
Sect. 1.

damage which may be accurately measured, and a disproportionate sum is annexed as payable generally upon breach of all or any of the stipulations, the latter sum will be considered as a penalty, and not as liquidated damages (a). So also where one lump sum is made payable by way of compensation on the occurrence of any one of several events some of which may occasion serious and others trifling damage, the presumption is that the parties intended the sum to be penal (b).

Where construed
as liquidated
damages.

Where, however, the payments stipulated are made proportionate to the extent to which the contractors may fail to implement their obligations and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages (bb). So also if a contract consisting of one or more stipulations, provides for the payment of a specified sum by way of compensation in case of the non-performance of all or of any of the things stipulated to be done, and the damages in each case of non-performance are in their nature altogether indefinite and uncertain, the sum named will be regarded as liquidated damages, and not as a penalty (c). Thus, where a surgeon had covenanted not to practise within a certain district, or interfere with the patients of the plaintiff within that district, or induce them to employ any other medical man, &c., and to pay as liquidated damages, in the event of any infringement of any of the stipulations of the covenant, the sum of 1,000*l.*, it was held that, as the damages arising from the breach of these different stipulations were altogether uncertain and difficult to ascertain, the parties had a right to measure them for themselves and settle the amount to be paid for a breach of all or any one of the stipulations (d). So, also, where an attorney had covenanted not to carry on business within a certain district,

(a) *Kemble v. Farren*, 6 Bing. 141;
Horner v. Flintoff, 9 M. & W. 680;
Reynolds v. Bridge, 6 E. & B. 541;
Dimech v. Corlett, 12 Moo. P. C. 229;
Re Newman, 4 C. D. 731.

(b) *Elphinstone v. Monkland Iron Co.*, 11 A. C. 332.

(bb) *Ib.*

(c) See *Wallis v. Smith*, 21 C. D. 249; *Law v. Local Board of Red-ditch*, (1892) 1 Q. B. 127 (C. A.).

(d) *Atkins v. Kinneir*, 4 Exch. 81; *Mercer v. Irving*, El. Bl. & El. 563.

or solicit or influence the clients of another attorney, and that if he in any way infringed that covenant he should pay 1,000*l.* as liquidated damages, it was held to be liquidated damages in the event of either of the things being done which were stipulated not to be done (*e*). So, also, where a man had covenanted not to carry on a certain trade within London or 600 miles thereof, and for the observance of the covenant bound himself in the sum of 5,000*l.*, as liquidated damages, it was held that the whole sum was recoverable in the event of either of the things being done which he had covenanted not to do (*f*). The fact that the sum agreed on is made payable upon one event only is evidence to show that it was intended to be liquidated damages (*g*).

When the amount of the penalty is small, as compared with the value of the subject of the agreement, the sum reserved will be treated as a mere penalty and not as an alternative agreement (*h*). But the reservation of a right to have full payment of money actually due on an existing contract, should there be failure to pay a smaller sum on a day certain, will not be treated as a penalty (*i*).

The fact that a sum named in a lease as payable upon breach of the covenants therein contained, may greatly exceed the actual damage, does not render the sum so reserved a penalty. It may be an increased rent agreed upon between the parties to be paid during the rest of the term. Thus in *Woodward v. Gyles* (*k*), where the agreement was that the defendant should not plough up any part of the land, and that if he did plough up any part of it he should pay at the rate of 20*s.* per acre per annum, the Court held that the parties had fixed a price for the ploughing, and refused an injunction. "The reservation of the reserved rent in this case," said Lord St. Leonards in *French v. Macale* (*l*), "during the whole term

(*e*) *Galsworthy v. Strutt*, 1 Exch. 663.

(*f*) *Price v. Green*, 16 M. & W. 346.

(*g*) *Sainter v. Ferguson*, 7 C. B. 716; *Law v. Local Board of Red-ditch*, (1892) 1 Q. B. 127 (C. A.).

(*h*) *Chilliner v. Chilliner*, 2 Ves.

528; *Howard v. Hopkyns*, 2 Atk. 371; *Logan v. Wienholt*, 1 Cl. & Fin. 611.

(*i*) *Thompson v. Hudson*, L. R. 4 H. L. 1.

(*k*) 2 Vern. 119.

(*l*) 2 Dr. & War. 276.

Chap. X.
Sect. 1.

shows that the parties contemplated the payment of one rent in one event, and of another rent in another state of circumstances." So also in *Rolfe v. Peterson* (*m*), where a certain sum was reserved, and the lessee covenanted that, in case any part of the land which had been in tillage for the last twenty years should be broken up, he would pay the further sum of 5*l.* per annum for every acre so broken up over the rent reserved and upon the same days of payment, the Court held this a case of liquidated damages, fixed and agreed upon between the parties (*n*). So also in *Farrant v. Olmius* (*o*), the reservation of an additional sum of 50*l.* for every acre of meadow land, which should be ploughed up or converted into tillage, was held to be liquidated damages. "There is nothing unreasonable," said Lord Tenterden (*p*), "in a landlord stipulating that particular lands shall be converted into tillage, and that in case that be done, a larger sum shall be paid by way of stipulated damages" (*q*). So also in a case where there was a covenant against erecting a weir under double the yearly rent therein-after reserved, to be recovered by distress, the sum so reserved was held to be liquidated damages, notwithstanding it was called a penalty in the instrument. The power of distress reserved in an instrument is strong evidence that the sum so reserved is liquidated damages (*r*).

The Agricultural Holdings Act, 1900 (*s*), provides that notwithstanding any provision in a contract of tenancy making the tenant liable to pay a higher rent or other liquidated damages in the event of any breach or non-fulfilment of a covenant or condition a landlord shall not be entitled to recover by distress or otherwise, any sum in consequence of any breach or non-fulfilment of any such covenant or condition in excess of the damage actually suffered by him in consequence of the breach or non-fulfilment. Provided that this section shall not apply to any covenant or condition against breaking

(*m*) 2 Bro. P. C. 436.

(*n*) *Per* Lord St. Leonards; *French v. Macale*, 2 Dr. & War. 277.

(*o*) 3 B. & Ald. 692.

(*p*) *Ib.*

(*q*) *Domville v. Ford*, 1 R. 7 C. L. 534.

(*r*) *Gerrard v. O'Reilly*, 3 Dr. & War. 414.

(*s*) 63 & 64 Vict. c. 50, s. 6.

up permanent pasture, grubbing underwoods, or felling, cutting, lopping, or injuring trees, or regulating the burning of heather. Chap. X.
Sect. 1.

But where in addition to the increased rent there is also a stipulation that the doing of the act provided against shall be attended with a forfeiture of the interest of the covenantor, the sum is a penalty and not liquidated damages (t). Where too the covenant is in its nature continuing the sum reserved as payable upon breach will be regarded as a penalty and not as liquidated damages. Thus where a lessee had covenanted not to burn the demised premises, part of which was ancient meadow, under the penalty of 10*l.* per acre to be recovered in the reserved rent for every acre so burned, he was restrained by Lord St. Leonards from burning part of the premises (u). So also where the covenant is an absolute one and cannot be construed as meaning that a lessee shall have power to do a certain act on payment of an additional rent, the lessee will be restrained from doing the particular act complained of (x).

Forfeiture in addition to increased rent.

Covenant of a continuing nature.

A Court of equity will not determine upon interlocutory application to dissolve an injunction whether a sum reserved is a penalty or liquidated damages, but will only consider whether there is a good *prima facie* case for an injunction and whether more mischief will be done by granting than by withholding it (y).

Court will not determine on interlocutory application whether sum reserved is a penalty or liquidated damages.

After a Court of law has determined that the word "penalty" in an agreement not to do a certain act under a certain penalty means liquidated damages, a man cannot come to the Court for an injunction to restrain the further breach of the agreement after obtaining damages at law: the fact that owing to the bankruptcy of the defendant after judgment in the action the plaintiff has not recovered the sum stipulated by way of damages does not give him any equity to an injunction (z).

Injunctions not granted when damages are liquidated.

(t) *French v. Macale*, 2 Dr. & War. 269. *bury v. Cundy*, 58 L. T. 155.

(u) *Ib.* See *Howard v. Hopkyns*, 2 Atk. 371; *Willson v. Love*, (1896) 1 Q. B. 626. (y) *Coles v. Sims*, 5 D. M. & G. 1, 11.

(z) *Saintier v. Ferguson*, 1 Mac. & G. 286; *General Accident Assurance Corporation v. Noel*, (1902) 1 K. B. 377.

(x) *Weston v. Metropolitan Asylum District*, 9 Q. B. D. 404; *Han-*

Chap. X.
Sect. 1.

Agreement
not to apply
to Parliament.

So also where a man had commenced an action to recover a penalty as and for liquidated damages for the breach of an agreement on the part of the defendant not to practise as a surgeon within a certain district, it was held that he was not entitled to an injunction also to restrain him from so practising (a). The plaintiff is bound in such a case to elect between the two remedies (b). If a man after obtaining an injunction brings an action for damages, the defendant may come to the Court and have the injunction dissolved (c).

The Court has jurisdiction on a proper case being made out to restrain parties from violating an agreement not to apply to Parliament. In exercising the jurisdiction the Court, as in other cases when it interposes by way of injunction, acts merely upon the person and does not in any way interfere with the privileges of Parliament (d), it simply says that it is not competent for a given party to apply to Parliament (e). What is a proper case for the interference of the Court is a question of much difficulty. The fact that the intended application to Parliament will abrogate existing rights and create new ones can give no right to an injunction, for every man has a right to apply to Parliament for a special law to supersede the rules of property by which he is bound (f). Nor will the Court interfere, even when an agreement not to apply to Parliament has been entered into for the purpose of protecting private interests, if the party who makes the application to the legislature can urge it upon grounds of public policy, for such questions are subjects for the discussion of the legislature and are beyond the province of a Court of equity (g). The only case in which the Court will interfere is

(a) *Carnes v. Nesbitt*, 7 H. & N. 158, 778; *Mayall v. Higby*, 1 H. & C. 152.

(b) *General Accident Assurance Corporation v. Noel*, (1902) 1 K. B. 377, 71 L. J. K. B. 236.

(c) *Fox v. Scurd*, 33 Beav. 327.

(d) *Heathcoate v. North Staffordshire Railway Co.*, 2 Mac. & G. 109.

(e) *Lancaster and Carlisle Railway Co. v. North Western Railway Co.*,

2 K. & J. 304.

(f) *Ware v. Grand Junction Canal Co.*, 2 R. & M. 470, 483; *Heathcoate v. North Staffordshire Railway Co.*, 2 Mac. & G. 109; *Steele v. Midland Railway Co.*, 2 Ch. 237.

(g) *Lancaster and Carlisle Railway Co. v. North Western Railway Co.*, 2 K. & J. 304.

where the matter complained of is connected solely with private property (*l*). Accordingly Lord Cottenham refused to restrain a railway company from applying to Parliament for leave to abandon a part of their railway in contravention of an agreement entered into with the plaintiff, who had withdrawn his opposition to a bill in a previous session of Parliament upon consideration of the company agreeing to carry the railway in the direction which they proposed by their bill to abandon (*i*). So also Lord Hatherley refused to restrain a railway company from applying to Parliament for powers to make a new line in contravention of an agreement entered into with the plaintiff company, on the faith of which the plaintiff company had withdrawn all opposition to the bill presented by the defendant company in a previous session of Parliament (*k*). So also in *Attorney-General v. Manchester and Leeds Railway Co.* (*l*), there having been a motion pending before the Lord Chancellor with reference to a particular bridge, which was to be made over the road in a way which was supposed to be injurious to the public, the company had undertaken that nothing should be done until the hearing of the cause to interfere with the existing state of things, and notwithstanding the undertaking they had taken the opportunity of inserting in a bill before Parliament a clause to liberate them from that undertaking entirely, and to enable them to do that which they had undertaken not to do, Lord Cottenham, though he expressed himself in the strongest terms as to the conduct of the railway company, said he saw very great difficulty in preventing an application to Parliament, and that unless a strong authority were adduced he should not assume that particular jurisdiction (*m*).

An injunction may be granted to prevent an improper application of funds, subject to any public or private trust, in

(*h*) *Lancaster and Carlisle Railway Co. v. North Western Railway Co.*, 2 K. & J. 303; *Telford v. Metropolitan Board of Works*, 13 Eq. 594.

(*i*) *Heathcote v. North Staffordshire Railway Co.*, 2 Mac. & G.

100.

(*k*) *Lancaster and Carlisle Railway Co. v. North Western Railway Co.*, 2 K. & J. 293.

(*l*) 1 Ra. Ca. 436.

(*m*) 2 K. & J. 304.

Chap. X.
Sect. 1.

Covenant not
to oppose a bill
in Parliament.

Importation
of a negative
quality into
an affirmative
agreement.

promoting or opposing a bill in Parliament (*n*). A municipal corporation, however, will not be restrained from defraying out of its funds the expense of resisting an attack made by a bill in Parliament against its property, rights, or privileges (*o*).

Whether a Court of equity will interfere to restrain parties from violating a covenant not to oppose a bill in Parliament is doubtful (*p*). But in a case where the bill would, if passed into an Act, have had the effect of depriving a minority of the shareholders of a railway company of the protection of the Wharnccliffe order, the Court would not enforce a covenant not to oppose it (*q*).

The mode in which contracts or covenants, when affirmative in form, are, as a general rule, enforced by Courts of equity is by decree for specific performance. But contracts and covenants, though affirmative in form, may often involve a negative in substance. When the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts which are inconsistent with the agreement (*r*). Thus where A. agrees to give B. a first refusal of property, this involves a negative contract, and A. will be restrained from parting with the property to any one else without giving to B. the "first refusal" at a reasonable price (*s*). So also where a person agreed to take the whole of the electric energy required for his premises from a company, it was held that there was an implied contract not to take electric energy for his premises from any one else (*t*).

In like manner a man, who, in a demise of land has entered into a covenant for quiet enjoyment, will be restrained from

(*n*) *Att.-Gen. v. Corporation of Norwich*, 16 Sim. 225; *Att.-Gen. v. Mayor, &c., of Wigan*, 5 D. M. & G. 52; *Leith Council v. Leith Harbour and Docks Commissioners*, (1899) A. C. 508.

(*o*) *Att.-Gen. v. Brecon*, 10 C. D. 204; cf. *Att.-Gen. v. Swansea Corporation*, (1898) 1 Ch. 602.

(*p*) *Parker v. River Dun Navigation Co.*, 1 De G. & S. 192.

(*q*) *Maunsell v. Midland Great*

Western Railway Co. of Ireland, 1 H. & M. 162.

(*r*) *Lumley v. Wagner*, 1 D. M. & G. 604; *De Mattos v. Gibson*, 4 D. & J. 299; *Doherty v. Alman*, 3 App. Ca. 720, per Lord Cairns.

(*s*) *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, (1901) 2 Ch. 37.

(*t*) *Metropolitan Electric Supply Co. v. Ginder*, (1901) 2 Ch. 799.

doing acts which are in violation of the covenant (*u*) ; although they do not affect the title to or possession of the property but only constitute a substantial physical interference with its enjoyment (*x*). So also lessees who had covenanted to manage land or cultivate a farm in a husbandlike manner have been restrained from ploughing up pasture (*y*), or meadow land (*z*), from carrying off the farm hay, straw, dung, crops, &c., except according to the custom of the country (*a*), and the usual course of husbandry (*b*), from sowing the land with pernicious crops (*c*), and turning young goats into a wood (*d*). So also persons who had covenanted to keep the banks of rivers and ponds in repair were restrained from destroying or injuring them (*e*). So also a man who had covenanted to keep and preserve trees from waste and damage was restrained from felling or injuring the timber (*f*). So also a railway company which has obtained the ownership of land under an agreement with the landowners as to the mode in which a bridge or a road was to be constructed on the land, was not allowed to depart from the terms of the agreement. Another company claiming under the former is equally bound (*g*). So also a

(*u*) *Tipping v. Eckersley*, 2 K. & J. 270. See *Rolleston v. New*, 4 K. & J. 640; *Pattison v. Gilford*, 18 Eq. 259; *Gearns v. Baker*, 10 Ch. 355; *Leader v. Moody*, 20 Eq. 145; *Newton v. Nock*, 43 L. T. 197.

(*x*) *Tebb v. Cave*, (1900) 1 Ch. 642.

(*y*) *Drury v. Molins*, 6 Ves. 328; *Pratt v. Brett*, 2 Madd. 62.

(*z*) *Pratt v. Brett*, *ib*.

(*a*) *Pulteney v. Shelton*, 5 Ves. 260 n.; *Kimpton v. Eve*, 2 V. & B. 349; *Walton v. Johnson*, 15 Sim. 352. See *Phipps v. Jackson*, 56 L. J. Ch. 550; *Lybbe v. Hart*, W. N. (1883) 61, 127.

(*b*) *Onslow v. —*, 16 Ves. 173. See, as to covenants to cultivate according to the custom of the country, *Webb v. Plummer*, 2 B. & Ald. 746; *Womersley v. Dally*,

26 L. J. Ex. 219. See, also, as to covenants in a farming lease, *Gale v. Bates*, 3 H. & C. 84; *Phipps v. Jackson*, 35 W. R. 378, 56 L. J. Ch. 550. In *Pratt v. Brett*, 2 Madd. 62, and *Onslow v. —*, 16 Ves. 173, the tenant was tenant from year to year. In *Onslow v. —*, *ib.*, there appears to have been no express covenant to cultivate in a husbandlike manner: the covenant seems to have been implied by the Court.

(*c*) *Pratt v. Brett*, 2 Madd. 62.

(*d*) *Rogers v. Price*, 13 Jur. 820.

(*e*) *Lord Bathurst v. Burden*, 2 Bro. C. C. 64.

(*f*) *Bernard v. Meara*, 12 Ir. Ch. 389.

(*g*) *Edinburgh, &c., Railway Co. v. Campbell*, 4 Macq. 578.

Chap. X.
Sect. 1.

man who has covenanted to carry on a certain business will be restrained from doing or causing anything to be done, which would put it out of his power to carry on the business (*h*). So also a lessor who has entered into a direct, specific and express covenant with a lessee to perform all the covenants in the superior lease under which he holds, may not by any surrender of such lease derogate from the rights which his lessee has acquired from him under the lease, and he will be restrained by injunction from acting in violation of the covenants, under which he became bound to such lessee (*i*). So also where a vendor makes a representation that property is subject to certain covenants affecting it permanently and he does so in order to induce a person to buy part of such property, and the person buys part of the property on the faith of such representation, the vendor will be restrained by injunction from doing anything to prevent the property from continuing to be what he has represented it to be (*k*).

Implication
of negative
covenants.

So also railway companies have been restrained from entering into agreements which are in violation of or are inconsistent with a subsisting agreement (*l*). So also a railway company which had granted to two persons the sole and exclusive privilege of selling books at their stations was restrained by injunction from evicting them from the bookstalls at the stations (*m*). So also where the owners of a public building had contracted with a man that he, renting a stall from them, should have the exclusive right to exhibit and sell certain specified classes of goods, they were restrained by injunction from permitting the exhibition and sale by other renters of stalls within the building of goods so specified (*n*). So also a railway company which had agreed to work the line of another

(*h*) *Hooper v. Brodrick*, 11 Sim. 47.

(*i*) *Piggott v. Stratton*, 1 D. F. & J. 33.

(*k*) *Martin v. Spicer*, 34 C. D. 1; 14 A. C. 12.

(*l*) *Shrewsbury and Chester Railway Co. v. Shrewsbury and Birmingham Railway Co.*, 1 Sim. N. S.

410; *Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co.*, 2 Ph. 597.

(*m*) *Holmes v. Eastern Counties Railway Co.*, 3 K. & J. 675.

(*n*) *Altman v. Royal Aquarium Society*, 3 C. D. 228.

railway company, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified, was restrained by injunction from carrying over other lines belonging to them traffic which ought to have passed over plaintiffs' line (*o*). So also where a sewage company had entered into an agreement with a local Board of Health, and had covenanted to keep the outfall of the works with the engines, &c., in proper working order, so as to admit of the free flow of the sewage through the sewers, they were restrained from permitting the sewage to remain in the sewers, so as to be a nuisance to the plaintiffs, and from damming up and heading back the sewage in the sewers (*p*). So also the Metropolitan Board of Works were restrained from promoting a scheme which was inconsistent with a stipulation which they had entered into with the plaintiff. It was held also that the plaintiff's right under the stipulation to sue in equity was not affected by the circumstance that the scheme in order to become operative must be submitted to Parliament (*q*). So also where the lessee of a mill with engines, boilers and other machinery attached thereto, who had covenanted to keep the same in good repair, reasonable tear and wear excepted, had pulled down part of the machinery and put up in its place more powerful machinery, his assignees in bankruptcy were restrained from removing the new machinery (*r*). So also where a plan has been approved between parties for the erection of a building, one of them will be restrained from afterwards interfering with the mode of building approved (*s*). So also a local Board was restrained from enforcing a rate in violation of an agreement which they had entered into with the plaintiff (*t*). So also where a husband had stipulated by deed that a child should be under the sole care and protection of

- (*o*) *Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co.*, 16 Eq. 433. (*r*) *Sunderland v. Newton*, 3 Sim. 450.
 (*p*) *Nuneaton Local Board v. General Sewage Co.*, 20 Eq. 127. (*s*) *Slee v. Corporation of Bradford*, 4 Giff. 262.
 (*q*) *Telford v. Metropolitan Board of Works*, 13 Eq. 574. (*t*) *Ashworth v. Hebden, &c.*, Local Board, 47 L. J. Ch. 195.

Chap. X.
Sect. 1.

his wife, the Court will, if it can be shown that the control of the father would be injurious to the child, restrain him from removing or prosecuting any proceedings to obtain the child from the custody of his wife or from interfering with her in the management, care and protection of the child (u).

In *Mayor of London v. Hedger* (x), it was held that a covenant by a lessee to deliver up at the end of the term the premises in good repair did not affect the right of the lessor to an injunction to restrain the lessee from pulling down buildings on the demised premises and carrying away the materials (y). But where a lessee covenanted to repair and keep up the demised premises, it was held that there being no negative covenant, the lessee was entitled to pull down and re-erect the premises (z).

Negative quality not imported into an agreement which cannot from its nature be specifically enforced.

But if an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an injunction is in effect and spirit an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the plaintiff to his remedy by damages (a). The Court will not enforce a covenant where to do so would require supervision which the Court could not undertake. Thus the Court refused to enforce a covenant by a landlord to appoint a resident porter to a building let in flats (b). So also in *Clarke v. Price* (c), where the defendant had agreed to take notes of cases in Court, and compose reports

(u) *Swift v. Swift*, 4 D. J. & S. 710; *Hamilton v. Hector*, 13 Eq. 511; comp. *Vansittart v. Vansittart*, 2 D. & J. 249.

(x) 18 Ves. 355.

(y) See *Ward v. Duke of Buckingham*, cited 10 Ves. 161, as to the enforcement of covenants, affirmative in character, which, as appeared from defendant's conduct, he was not going to perform. See, also, as to importing a negative character into an affirmative covenant, *Newmarch v. Bradling*, 3 Sw. 99; *Frogley v. Lord Lovelace*, John. 333; *Philipps v. Treeby*, 8 Jur. N. S. 999.

(z) *Re McIntosh and Pontypridd Co.*, 61 L. J. Q. B. 164. *Sed quere.*

(a) *Lumley v. Wagner*, 1 D. M. & G. 622; *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468; *Merchants' Trading Co. v. Banner*, 12 Eq. 23; *Warne v. Routledge*, 18 Eq. 501; *Doherty v. Alman*, 3 App. Ca. 720, *per Lord Cairns*; *Ryan v. Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. 116 (C. A.).

(b) *Ryan v. Mutual Tontine Westminster Chambers Association*, (1893) 1 Ch. 116 (C. A.).

(c) 2 Wils. C. C. 157.

for the plaintiff, and had failed to do so, Lord Eldon refused to restrain him from making reports for other persons (*d*). So also, where a grant had been made to the plaintiff of an office involving duties of a personal and confidential character, the Court refused to restrain the defendant from employing any other person than the plaintiff in the office, as the case was one where, from its very nature, specific performance could not be decreed (*e*). So also, where the plaintiff had contracted with a railway company for a stipulated sum to work the line of the railway, and to keep the engines and rolling stock in repair, the Court, upon the ground that the agreement was one which from its very nature could not be specifically enforced, refused to restrain the company from employing any other person than the plaintiff in the duties for which he had been engaged (*f*). So also where a company had engaged to employ the plaintiff as a broker for engaging freights, effecting charter-parties, &c., and it was stipulated that his name should appear jointly with that of the secretary in all the advertisements of the company, the Court would not restrain the company from issuing any advertisement, unless the name of the plaintiff was therein inserted (*g*).

So also the Court would not restrain the directors of a company from acting upon and enforcing the resignation of an agent (*h*). So also, where an indenture was held to constitute the relation of master and servant and not that of partner, Lord Truro dissolved an injunction which had been granted restraining the defendant from excluding the plaintiff from the management of the business (*i*). So also the Court will not as a rule restrain by injunction the breach of a contract for the sale and delivery of chattels (*k*). So also, where a

Injunction—
when not
granted.

(*d*) See *Baldwin v. Society of Useful Knowledge*, 9 Sim. 393; *Hope v. Hope*, 22 Beav. 351.

(*e*) *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249; *Millican v. Sullivan*, 4 Times R. 204. See *Firth v. Ridley*, 33 Beav. 513.

(*f*) *Johnson v. Shrewsbury and Birmingham Railway Co.*, 3 D. M.

& G. 914; *Millican v. Sullivan*, 4 Times R. 204.

(*g*) *Brett v. East India and London Shipping Co.*, 2 H. & M. 404.

(*h*) *Mair v. Himalaya Tea Co.*, 1 Eq. 411.

(*i*) *Stocker v. Brocklebank*, 3 Mac. & G. 267.

(*k*) *Fothergill v. Rowland*, 17 Eq.

Chap. X.
Sect. 1.

contract is vague, indefinite, or uncertain in its terms, the Court will not import a negative into it and enforce it by way of injunction (l). Nor will the Court enforce by mandatory injunction the performance of covenants in a farming lease as to the cultivation of land (m). Nor will the Court restrain by injunction a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses and cattle (n). So, also, in a case where there was a proviso in the lease of a mine that the lessor might at the end of the term purchase the machinery in the mine at a certain valuation to be made by arbitrators, one of them to be nominated by the lessee, the Court would not restrain the lessee from removing the machinery at the end of the term, as it could not compel him to name an arbitrator (o). Nor, where the stipulations sought to be enforced are subsidiary to the whole agreement, will a negative be imported so as to be a foundation for an injunction, unless the whole agreement is capable of being specifically enforced (p).

Negative quality may be imported where some of the stipulations are distinct and separate from the rest of the agreement.

But though the agreement may be one which cannot from its very nature be specifically enforced as a whole, the Court will, where parts of the agreement are distinct and separable from the rest, import a negative and interfere by way of injunction (q). Where, therefore, a railway company had granted to certain lessees a licence to publish advertisements in the company's carriages, and the sole licence of selling books, &c., at their stations, the Court restrained the company from removing the advertisement, and from evicting the plaintiff from the bookstalls at the stations, though there were

132. But see *Donnell v. Bennett*, 22 C. D. 837; and see also Sale of Goods Act, 1893, s. 52.

(l) *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sim. & G. 119; *De Mattos v. Gibson*, 4 D. & J. 276; *Low v. Innes*, 4 D. J. & S. 290.

(m) *Musgrave v. Horner*, 23 W. R. 125, W. N. (1874) 212.

(n) *Phipps v. Jackson*, 56 L. J.

Ch. 550.

(o) *Hamilton v. Dunsford*, 6 Ir. Ch. 412; and see *Darbey v. Whitaker*, 4 Dr. 134.

(p) *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119; *Scottish North Eastern Railway Co. v. Stewart*, 3 Macq. 382.

(q) *Holmes v. Eastern Counties Railway Co.*, 3 K. & J. 675.

other parts of the agreement which the Court could not enter into (r). So also where on the sale and purchase of land the purchaser covenanted with the vendor, a brewer, that he should have the exclusive right of supplying all ale, beer and porter which should be consumed in any building which should be erected on this particular piece of land, the Court restrained the defendant who took under the purchaser from acting in contravention of the covenant, in spite of the fact that in the conveyance to the original purchaser the vendor did not covenant to supply any ale, beer or porter (s).

Chap. X.
Sect. 1.

The contract of charter-party is, from the peculiar nature of the subject of the contract, an exception to the rule that a negative quality will not be imported into an affirmative agreement, unless the agreement is of such a nature that a decree for specific performance can be made (t). "I think," said Lord Chelmsford, in *De Mattos v. Gibson* (u), "that a vessel under a charter-party ought to be regarded as a chattel of peculiar value to the charterer, and that although a Court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden according to the principle expressed in *Lumley v. Wagner*." If a charter-party is *bonâ fide* entered into between the owner of a vessel and the charterer, either party is entitled to an injunction to restrain the other from doing anything inconsistent with the agreement (x).

Negative quality
imported into a
charter-party.

If the agreement consists of two or more stipulations, and is one which cannot from its very nature be specifically enforced as a whole, the Court will not import a negative quality into the agreement so as to be a foundation for an injunction, unless the person who makes the application has actually performed his own part of it.

Negative quality
not imported
into an agree-
ment, unless
the party who
seeks the aid of
the Court has
performed his
own part of it.

(r) *Ib.*

(u) 4 D. & J. 276, 298.

(s) *Catt v. Tourle*, 4 Ch. 654; and see *Metropolitan Electric Supply Co. v. Ginder*, (1901) 2 Ch. 799, 807.

(x) *Sevin v. Deslandes*, 30 L. J.

(t) *De Mattos v. Gibson*, 4 D. & J. 276. See this case discussed in *Whitwood Chemical Co. v. Hardman*, (1891) 2 Ch. 416, 431 (C. A.).

Ch. 457; *Messageries Impériales v. Baines*, 11 W. R. 322; *Heriot v. Nicholas*, 12 W. R. 844. See, as to the measure of damages in such a case, *De Mattos v. Gibson*, 1 J. & H. 79, s. c., 7 Jur. N. S. 282.

Chap. X.
Sect. 1.

performed his own part of the agreement (y). The mere assertion on his part that it is his intention to perform his part of the agreement is not sufficient, unless the Court can decree specific performance against him (z). Thus where an agreement had been entered into between a railway company and a contractor, whereby the contractor agreed to complete the line of railway, and the company agreed to pay him in shares and debentures as the works progressed, but the company repudiated the contract, the Court refused to restrain the company from dealing with the debentures and shares in a manner inconsistent with the agreement, on the ground that it was beyond the power of the Court to make him perform his part of the contract (a). So, also, in *Fechter v. Montgomery* (b), the manager of a London theatre engaged for a period of two years a provincial actor, who was desirous of appearing on a London stage. Though there was nothing express on the subject, the Court implied an engagement on the part of the manager not merely to pay the agreed salary but to give the actor the opportunity of appearing on the stage, and an engagement on the part of the actor not to perform elsewhere. The manager having delayed the appearance of the actor for five months, the Court considered that his conduct was in spirit a breach of the engagement, and would not restrain the actor from acting elsewhere. In *Holmes v. Eastern Counties Railway* (c), the conduct of the plaintiff in respect of his part of the agreement had not been strictly honourable, but the damage to which he would have been exposed, had the injunction been refused, was so serious, that the Court imported a negative quality into the agreement and granted an injunction (d).

Agreement
containing both
affirmative
and negative
stipulations.

Where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative,

(y) *Fechter v. Montgomery*, 33 B. 22; *Grimston v. Cunningham*, (1894) 1 Q. B. p. 130.

(z) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468.

(a) *Peto v. Brighton Railway Co.*, 1 H. & M. 468. See *Ogden v.*

Fossick, 4 D. F. & J. 426.

(b) 33 Beav. 22; but see *Whitwood Chemical Co. v. Hardman*, (1891) 2 Ch. 416 (C. A.).

(c) 3 K. & J. 675.

(d) See *Hamilton v. Dunsford*, 6 Ir. Ch. 412.

the Court will in a proper case enforce the negative portion of the covenant(e); and the Court may also enforce by injunction the negative part of an agreement containing both affirmative and negative stipulations, although the affirmative part of the agreement is of such a nature that it could not be specifically enforced(f). In *Lumley v. Wagner*(g) the defendant had entered into an engagement with the plaintiff to sing at his theatre and not to sing at any other theatre. Lord St. Leonards restrained her from singing at any other theatre than the plaintiff's, though it was beyond all doubt that he had not the power to decree specific performance of the affirmative part of the agreement. "The case," he said(h), "is a mixed one, consisting not of two correlatives to be done, one by the plaintiff and the other by the defendant, but of an act to be done by the defendant alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being auxiliary to, concurrent and operating with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that term not to sing for anybody else, is not a correlative contract; it is in fact one contract. The engagement to perform at one theatre must necessarily exclude the right to perform at the same time at another theatre"(i). So also where a contract for the sale of chattels contained an express negative stipulation not to sell to any other person, an injunction was granted to restrain the doing of the act stipulated not to be done, although the contract was one of which specific performance would not have been granted(k).

*Lumley v.
Wagner.*

*Lumley v.
Wagner.*

- "With regard to the case of *Lumley v. Wagner*," said Lord
- (e) *Clegg v. Hands*, 44 C. D. 503 (C. A.).
- (f) *Lumley v. Wagner*, 1 D. M. & G. 604. Cases of this kind, however, are not to be extended, *post*, p. 404.
- (g) 1 D. M. & G. 604.
- (h) *Ib.* 618.
- (i) *Webster v. Dillon*, 3 Jur. N. S. 433; *Daggett v. Ryman*, 16 W. R. 302, W. N. (1868) 3; *Grimston v. Cuninghame*, (1894) 1 Q. B. 125.
- (k) *Donnell v. Bennett*, 22 C. D. 837. See also *Metropolitan Electric Supply Co. v. Ginder*, (1901) 2 Ch. 799; and see the Sale of Goods Act, 1893, s. 52.

Chap. X.
Sect. 1.

Selborne (l), "it is not a case which tends in any way to limit the ordinary jurisdiction of this Court, to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule, if it should be eventually adopted by this Court, to look in all such cases to the substance, and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative" (m).

In *Whitwood Chemical Company v. Hardman* (n) Lindley, L. J., said: "I agree with what Fry, L. J., has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley v. Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend." The true principle seems to be this: that the Court will consider whether the contract or covenant is or is not of a kind fit for being specifically enforced. If it is, the Court will restrain acts inconsistent with it, whether there are negative words or not; if it is not, no injunction will be granted even though negative words be present (o).

(l) 16 Eq. 440.

Forman, (1894) 3 Ch. 654.

(m) See *Donnell v. Bennett*, 22 C. D. 839, *per* Fry, L. J.; *Davis v.*

(n) (1891) 2 Ch. 428.

(o) See *Donnell v. Bennett*, 22 C.

The principle of the Court with respect to notice in its application to the case of persons taking property with notice of a previous contract affecting the same, has been thus generalised by Knight Bruce, L. J., in *De Mattos v. Gibson* (p). "It may be stated at least as a general rule that where a man by gift or purchase acquires property from another, with knowledge of a previous contract lawfully, and for valuable consideration, made by him, with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller" (q). Accordingly, the mortgagee of a charter-party, or the purchaser of a ship, with notice of a charter-party previously entered into was restrained from doing any act which would have the effect of interfering with the due performance of the charter-party (r).

Chap. X.
Sect. 1.

Enforcement
of covenants
by injunction
against persons
taking with
notice.

The jurisdiction of the Court over contracts and covenants is not confined to cases where an action at law can be maintained, but extends to cases where an action at law is not maintainable. Except in cases between landlord and tenant, the obligation of a covenant restricting the enjoyment of land (and not amounting to an easement, or to the grant of a rent-charge) does not run with the land at law so as to bind an assignee, although assigns be expressly named in the covenant (s). But such covenants, though not running with the land at law so as to give a legal remedy, and though not even purporting to bind assigns, will be enforced in equity, provided the person into whose hands the land passes has taken it with notice of the covenants (t). "The question," said Lord Cottenham, in *Tulk*

Enforcement by
injunction of
covenant relating
to the use and
occupation of
land against
persons taking
with notice.

D. 835, and cf. *Davis v. Forman*, (1894) 3 Ch. 654; *Ehrman v. Bartholomew*, (1898) 1 Ch. 671.

(p) 4 D. & J. 282.

(q) See *Barfield v. Nicholson*, 2 L. J. Ch. 90; *Hoare v. Dresser*, 7 H. L. C. 317; *Catt v. Tourle*, 4 Ch. 557.

(r) *De Mattos v. Gibson*, 4 D. & J. 276; *Messageries Impériales v. Baines*, 11 W. R. 322.

(s) *Austerberry v. Corporation of Oldham*, 29 C. D. 750 (C. A.).

(t) *Tulk v. Moxhay*, 2 Ph. 774; *Wilson v. Hart*, 1 Ch. 463; *Richards v. Revett*, 7 C. D. 224.

Chap. X.
Sect. 1.

Tulk v. Moxhay.

v. Moxhay (u), "is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased (x). Thus, where the owner in fee of a square garden in London and some houses in the square had conveyed the garden to A. in fee, and A. had covenanted for himself and assigns not to use the open space for any other purpose than as a square garden, it was held that a purchaser from A. with notice of the covenant was bound by it in equity, whether or not he was bound at law, and an injunction was granted to restrain him from building on the square garden (y). The principle of *Tulk v. Moxhay* applies to an under-lessee (z), and even to a mere occupier (a).

So where on the sale of a building estate there was a general deed of covenant prohibiting the various purchasers from using or allowing their lots to be used for certain purposes, persons claiming, through purchasers who had been parties to the deed, having notice of the covenant, were restrained from using their lots for any of the prohibited purposes (b). So also, where there was a covenant by purchasers of adjoining lots not to build on the garden spaces which were specified on the general building plan, a person claiming through one of the original covenantors having notice of the covenant was restrained from throwing out a bay window into the garden at the back of his house (c).

Restrictive
covenants.

So also where on the purchase of land the purchaser enters into restrictive covenants with the vendor with respect to the use and occupation of the land, the Court will, as a Court of

(u) 2 Ph. 777.

(x) See *London and South Western Railway Co. v. Gomm*, 20 C. D. 583, per Jessel, M. R.

(y) *Tulk v. Moxhay*, 2 Ph. 777.

(z) *Mander v. Falcke*, (1891) 2 Ch. 554 (C. A.); *John Brothers, &c., Brewery Co. v. Holmes*, (1900) 1 Ch. 188; *Holloway v. Hill*, (1902) 2 Ch. 612.

(a) *Mander v. Falcke*, *supra*.

(b) *Whatman v. Gibson*, 9 Sim. 196, 206; see *Jay v. Richardson*, 30 Beav. 568; *Nottingham Patent Brick Co. v. Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778 (C. A.); *Spicer v. Martin*, 14 A. C. 12.

(c) *Weston v. M'Dermott*, 2 Ch. 72; *Lord Manners v. Johnson*, 1 C. D. 673.

equity in favour of the successor in title of the vendor, enforce the restrictive covenants by injunction against the successor in title of the purchaser, having notice of the covenants (*d*). So also where, on the sale of land, part of a larger estate, the vendor enters into restrictive covenants with the purchaser with respect to the use and occupation of the land which he retains, the Court will, as a Court of equity in favour of the successor in title of the purchaser, enforce the restrictive covenants by injunction against the successor in title of the vendor having notice of the covenants (*e*). So also where land is offered for sale in lots subject to restrictive conditions, in accordance with a building scheme, the vendor, having sold one lot, is under an obligation to the purchaser of such lot to observe the conditions as to the lots remaining unsold in his hands, to the same extent as purchasers of the lots would be (*f*); and in such a case the vendor will be restrained from selling the unsold lots free from the restrictive covenants (*g*).

But if a man, on granting or demising land, takes a restrictive covenant from the purchaser for his own benefit and then grants or demises part of the land retained to other persons without any notice of the covenant, the benefit of the covenant does not enure to the subsequent grantee or lessee (*h*). In a case where A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs, and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property, but A. did not enter into any covenants as to the land retained; and A. afterwards sold to other persons various parts of the lots retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants

(*d*) *Mann v. Stephens*, 15 Sim. 379. 14 A. C. 12.

(*e*) *Maclean v. Mackay*, L. R. 5 P. C. 327; *Nicoll v. Fenning*, 19 C. D. 258.

(*f*) *Holford v. Acton Urban Council*, (1898) 2 Ch. 240.

(*g*) *Mackenzie v. Childers*, 43 C. D. 265; and see *Spicer v. Martin*,

(*h*) *Master v. Hansard*, 4 C. D. 718. See *Kemp v. Bird*, 5 C. D. 552, 974; *Sheppard v. Gilmore*, 57 L. J. Ch. 6; and see *In re Birmingham and District Land Co. and All-day*, (1893) 1 Ch. 342; *Ashby v. Wilson*, (1900) 1 Ch. 66.

Chap. X.
Sect. 1.

entered into by B. ; and A. afterwards bought back from B. what he had sold to him. It was held that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A. after the re-purchase, could make a title to the re-purchased land discharged from the covenants (i).

So also, in *Renals v. Cowlishaw* (k), the owners in fee of a residential estate and adjoining land sold part of the adjoining land to defendant's predecessors in title, who entered into covenants with the vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them : it was held that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title.

Principle of
these cases.

The principle governing this class of cases has been thus expressed by Hall, V.-C., in *Renals v. Cowlishaw* (l) : " It may be considered as determined that any one, who has acquired land, being one of several lots laid out for sale as building lots, when the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenant entered into by each of the purchasers, is entitled to the benefit of the covenant and that this right, that is the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established."

Question one
of intention.

The question, therefore, resolves itself into one of intention : " whether the restrictions are merely matters of agreement between vendor and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common benefit of the purchasers " (m).

(i) *Keates v. Lyon*, 4 Ch. 218.

(k) 9 C. D. 130, 11 C. D. 866.

(l) *Ib.*

(m) *Nottingham Brick and Tile*

This is a question which can only be determined from the circumstances of each particular case. If the restrictive covenants are merely for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit (*n*); and they may, it seems, enforce not only the covenants imposed at the time of their respective purchases, but also further covenants imposed on subsequent purchasers by the scheme as improved or enlarged (*o*).

The fact that the several purchasers were not aware at the date of their common purchase of the existence of any such covenants seems to be almost conclusive evidence of an intention that the covenants were not entered into for the benefit of the purchasers *inter se*, but for the advantage of the vendor himself (*p*).

On the other hand, the intention that such covenants shall enure for the benefit of the various purchasers *inter se*, may be either express; as, for instance, where, on the sale of a building estate in lots by the trustees of a building society each purchaser covenanted with the vendors to observe and perform certain building stipulations and the covenants were to enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but the covenantees were to be deemed trustees of the covenants for the benefit of the persons claiming under any conveyances already made by the trustees, it was held that every allottee and purchaser had an equity to enforce the covenants (*q*); or the intention may be implied from the surrounding circumstances, as, for instance, where land is

Enforcement
of restrictive
covenants by
purchasers
inter se.

Co. v. Butler, 15 Q. B. D. 268, *per* Wills, J.; *Spicer v. Martin*, 14 A. C. 12; *In re Birmingham and District Land Co. and Allday*, (1893) 1 Ch. 342.

(*n*) *Nottingham Brick and Tile Co. v. Butler*, 15 Q. B. D. 268; *Collins v. Castle*, 36 C. D. 243.

(*o*) *Tyndall v. Castle*, (1893) W. N. 40, 62 L. J. Ch. 555.

(*p*) *Keates v. Lyon*, 4 Ch. 218; *Master v. Hansard*, 4 C. D. 718; *Renals v. Cowlishaw*, 11 C. D. 866.

(*q*) *Eastwood v. Lever*, 4 D. J. & S. 114; *Jackson v. Winnifrith*, 47 L. T. 243.

Chap. X.
Sect. 1.

put up to auction in lots under conditions which define the restrictions to be placed upon and the covenants to be entered into by the various purchasers (*r*); or where land is sold either together or in lots to be built upon in accordance with a general building scheme (*s*); or where a vendor selling part of an estate covenants for himself and his assigns to place restrictions on the use of the adjoining land which he retains (*t*). The mere fact that the common vendor does not bind himself expressly to enforce the covenant which he takes for the benefit of the purchasers is not material, if the intention is otherwise clear that the purchasers are to be bound *inter se* (*u*). Nor can such a covenant be released by the original vendor as regards land with respect to which he has parted with the benefit of it (*x*). In a recent case an injunction was granted to restrain the conversion into a club of part of a building adapted for residential flats, at the instance of a tenant who held under an agreement in a common form binding the tenants to rules suitable only for residential purposes (*y*).

Purchaser may obtain benefit of restrictive covenant entered into with his vendor by another purchaser.

“A purchaser may also be entitled,” said Hall, V.-C., in *Renals v. Cowlishaw* (*z*), “to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant, and such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this the expressed or otherwise apparent purpose or object of the covenant in reference to its being intended to be annexed to other property or to its being only obtained to enable the covenantee more

(*r*) *Nottingham Brick and Tile Co. v. Butler*, 16 Q. B. D. 778 (C. A.); 379; *Coles v. Sims*, 5 D. M. & G. 1; *Nicoll v. Fenning*, 19 C. D. 258.

(*u*) *Harrison v. Good*, 11 Eq. 338; *Nottingham Brick and Tile Co. v. Butler*, 16 Q. B. D. 791.

(*s*) *Coles v. Sims*, 5 D. M. & G. 1; *Western v. M'Dermott*, 2 Ch. 72.

(*t*) *Harrison v. Good*, 11 Eq. 338; (*y*) *Hudson v. Cripps*, (1896) 1 Ch. 265.

(*z*) *Mann v. Stephens*, 15 Sim. 9 C. D. 130; 11 C. D. 868.

advantageously to deal with his property must be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and, if he has done so, whether or not he has sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."

Chap. X.
Sect. 1.

In order that covenants not running with the land at law should be enforceable in equity, it is essential that the purchaser should not be able to set up the defence of purchase for valuable consideration without notice (a). Mere constructive notice will be sufficient to preclude this defence (b). In *Wilson v. Hart* (c), a yearly tenant without express notice that his landlord was bound by a covenant not to use the premises as a beershop, was restrained from doing so, upon the ground that though only a yearly tenant, he was as much bound to inquire into his landlord's title as if he had been the purchaser of a larger interest. So also an under-lessee was held to be bound by covenants in the original lease of which he had no actual notice, on the ground that he ought to have satisfied himself as to his lessor's title (d). So also where a purchaser of the fee simple entered into restrictive covenants as to the user of the land and afterwards granted a lease which did not contain any similar prohibition, the lessee, though he had no actual notice of the covenant, was restrained at the suit of the original vendor from committing a breach (e).

Constructive
notice of
covenant
sufficient.

The principle of *Tulk v. Moxhay* (f), only applies to restrictive covenants, and does not apply to affirmative covenants binding the owner of the land at some future time to lay

Burden of
affirmative
covenant does
not run with
the land.

(a) *London and South Western Railway Co. v. Gomm*, 20 C. D. 583 (C. A.); and see *In re Cox and Nere's Contract*, (1891) 2 Ch. 109.

(b) *Patman v. Harland*, 17 C. D. 353; *Nottingham Brick and Tile Co.*, 16 Q. B. D. 787; *In re Cox and Nere's Contract*, ante. As to con-

structive notice, see *Conveyancing Act*, 1882, s. 3; and see *Holloway v. Hill*, (1902) 2 Ch. 612, 620.

(c) 1 Ch. 463.

(d) *Parker v. Whyte*, 1 H. & M. 167; *Clements v. Welles*, 1 Eq. 200.

(e) *Fielden v. Slater*, 7 Eq. 523.

(f) 2 Ph. 777.

Chap. X.
Sect. 1.

out money upon land or to do any act relating to land of what may be called an active character (g). The Court will not enforce a covenant not running at law with the land in such a way as to require the successors in title of the covenantor taking with notice to spend money on repairs and so undertake a burden (h). In like manner, where a man who had taken a lease of premises, subject to a restrictive covenant not to carry on upon the premises or permit or suffer any part thereof to be occupied by any person who should carry on there any noisome trade, made a sub-lease of the premises with a similar covenant on the part of the sub-lessee who entered into possession and began to carry on an offensive business, the Court would not compel the lessee to take proceedings against his tenant (i).

Although the burden of a restrictive covenant does not run at law, it is otherwise with the benefit of such a covenant. When the benefit of a restrictive covenant has been annexed to a piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of the land (k).

Perpetual
injunctions
granted in cases
of contract
without regard
to question of
convenience.

In cases of covenant or agreement, where the breach is clear and the covenant or agreement is of such a nature that it can consistently with the rules and principles of the Court be specifically enforced, the Court will not, unless under very exceptional circumstances (l), take into consideration at the hearing the comparative injury to the parties from granting or withholding the injunction (m). There may be cases in which it is clear that the damage to arise from the breach would be inappreciable and in which the Court would refuse to interfere. But the case must be free from all possibility of

(g) *Haywood v. Brunswick Permanent, &c., Society*, 8 Q. B. D. 403 (C. A.); *London and South Western Co. v. Gomm*, 20 C. D. 582 (C. A.).

(h) *Austerberry v. Corporation of Oldham*, 29 C. D. 750 (C. A.).

(i) *Hall v. Ewin*, 37 C. D. 74 (C. A.).

(k) *Rogers v. Hosegood*, (1900) 2 Ch. 388.

(l) See *Leader v. Moody*, 20 Eq. 153.

(m) *Tipping v. Eckersley*, 2 K. & J. 270; *Johnstone v. Hall*, ib. 420; *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 270.

doubt. It must be clear that there is no appreciable or at all events no substantial damage before the Court will refuse, upon the ground of smallness of damage, to withhold its hand from enforcing the execution (*n*). The mere fact that there has been a breach of covenant is a sufficient ground for the interference of the Court by injunction. A covenantee has the right to have the actual enjoyment of property *modo et formâ* as stipulated for by him (*o*). It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract entered into by him, the Court will protect the plaintiff in the enjoyment of the right which he has purchased (*p*). The circumstance that a work undertaken in breach of contract is one of great public importance, cannot be taken into consideration (*q*).

In like manner, in exercising the jurisdiction by way of ^{Mandatory} mandatory injunction against acts in violation of contract, ^{injunctions.} covenant, or agreement, the Court looks to the express stipulation of the agreement, and is not, as in cases of trespass or nuisance, influenced by considerations as to the nature or extent of the damage, or the comparative convenience or inconvenience of granting or withholding the injunction. A man who enters into an agreement is bound in equity to a true and literal performance of it. He cannot be suffered to depart from it at his pleasure, leaving the other

(*n*) *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 568. See *Warden of Dover Harbour v. South Eastern Railway Co.*, 9 Ha. 493; *Harrison v. Good*, 11 Eq. 351.

(*o*) *Tipping v. Eckersley*, 2 K. & J. 270; *Pigott v. Stratton*, John. 354, 1 D. F. & J. 33; *Western v. McDermott*, 2 Ch. 72; *Lord Manners*

v. Johnson, 1 C. D. 680.

(*p*) *Dickenson v. Grand Junction Railway Co.*, 15 Beav. 270; *Pigott v. Stratton*, John. 341; *Lord Manners v. Johnson*, 1 C. D. 680; *Richards v. Revitt*, 7 C. D. 225; *Castle v. Collins*, 36 C. D. 243.

(*q*) *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 568.

Chap. X.
Sect. 1.

party to his remedy by damages at law (*r*). There may be cases in which it is so clear that the mischief to arise from a breach of covenant would be inappreciable, that the Court may decline to interfere on the ground that a mandatory injunction would be out of all proportion to the requirements of the case, and would operate with extreme harshness on the defendant (*s*). But, as a general rule, the inconvenience to the defendant will not in such cases be taken into consideration (*t*). Nor can the defendant be permitted to set up the inconvenience to the public which would arise from his being compelled to perform his agreement (*u*).

Mandatory
injunctions.

Instances of.

The case of *Lane v. Newdigate* (*x*) is the first instance to be found in the books in which an order for a mandatory injunction was made against a breach of agreement. The plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills, and the defendant was bound by covenant to supply water for canals and reservoirs on his own estate to work the plaintiff's mills. The plaintiff brought his suit to enforce the doing of repairs by the defendant, and the restoring a cut and stop-gate in existence at the date of the lease, and the removing a lock which had been made since the date of the lease. Lord Eldon doubted whether he could order repairs to be done or the works to be restored, but arrived at the same end by restraining the defendant from hindering the enjoyment of the plaintiff by keeping the works out of repair, by the use of the lock, or by continuing the removal of the stop-gates (*y*).

(*r*) *Storer v. Great Western Railway Co.*, 2 Y. & C. C. C. 48; *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 579; *Att.-Gen. v. Mid-Kent Railway Co.*, 3 Ch. 101; *Hood v. North Eastern Railway Co.*, 5 Ch. 525. Comp. *Wilson v. Northampton and Banbury Railway Co.*, 9 Ch. 279.

(*s*) *Bowes v. Law*, 9 Eq. 636; *Kilbey v. Haviland*, 19 W. R. 698, W. N. (1871) 47. See *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 580.

(*t*) *Lord Manners v. Johnson*, 1 C. D. 680.

(*u*) *Lloyd v. London, Chatham, and Dover Railway Co.*, 2 D. J. & S. 579; *Raphael v. Thames Valley Railway Co.*, 2 Ch. 147; *Hood v. North Eastern Railway Co.*, 5 Ch. 525.

(*x*) 10 Ves. 192; and see (1899) 1 Ch. 439, n.

(*y*) See *Lord Kilmorey v. Thackeray*, cited 2 Bro. C. C. 64. Comp. *Blakemore v. Glamorganshire Railway Co.*, 1 M. & K. 185.

So also an agreement to grant a right of way was carried into effect by an injunction to restrain the removal of the materials and the destruction of the way (z). So also a man was restrained from continuing to keep up a wall on his land which obstructed a right which the plaintiff had under an agreement with him to use a certain road (a). So also the lessee of a field who in violation of the covenants in his lease caused the fall of one of the fences bounding the field by excavating the clay from under it, was compelled by a mandatory injunction in the negative form to restore the fence to its former condition (b). So also the Commissioners of Woods and Forests who had granted a lease of ground to the plaintiff as a site for a club house, and had covenanted in the lease that part of the land adjoining the ground so let should be laid out as an ornamental garden, and that no building should be erected thereon, were restrained from permitting such buildings as had already been erected from continuing on the ground (c). So also the lessee of a shop and house who had covenanted not to remove the plate glass windows in front of the house without substituting others of equal value was restrained from allowing the shop to remain without plate glass windows (d). So also where a lessee of a house and shop had covenanted not to make any alteration in the elevation of the premises or alter the decorations or iron railings in front thereof, or to make any addition without the consent of the lessor, and, notwithstanding the covenant, commenced alterations in the front windows of the shop and removed the iron railings and made a new doorway, he was restrained by injunction and ordered to restore the front of the shop to the state in which it was before the bringing of the action (e). So also a solicitor who had sold his business to the plaintiff, but kept possession of the books contrary to his covenant, was restrained from keeping the books away from the possession of the plaintiff, and from permitting the same

(z) *Newmarch v. Brandling*, 3 Sw. 99.

(a) *Philipps v. Treeby*, 8 Jur. N. S. 999.

(b) *Newton v. Nock*, 43 L. T. 197.

(c) *Rankin v. Huskisson*, 4 Sim. 13.

(d) *Brocklesby v. Munn*, W. N. (1870) 42.

(e) *De Nicols v. Abel*, W. N. (1869) 14.

Chap. X.
Sect. 1.

to remain away from the office of the plaintiff (f). So also a partner who had taken away one of the partnership books from the counting-house of the firm in breach of a covenant in the partnership deed, was restrained from continuing to violate the covenant (g), and from keeping it at any other place than the partnership premises (h). So also trustees of a chapel were restrained from permitting a minister to officiate in the chapel contrary to a covenant entered into by them (i). So also a mine owner who had covenanted to leave sufficient barriers against the adjoining collieries, but had broken his covenant, was restrained from permitting a communication with an adjoining mine to remain open and water to flow therefrom (k). So also a railway company which had agreed with a man to make a road at a certain level, were restrained from making a road at a lower level than they had agreed to do (l). So also a railway company which had agreed with the vendor of land to use a certain portion of the land as and for a first-class station for the purpose of taking up and setting down passengers, were restrained from allowing their trains to pass the station without stopping (m). So also where a building has been erected in a form that is in violation of a contract or an Act of Parliament, the Court may restrain the defendant from using the building (n), or may compel him to alter the elevation or form of the building so as to be in conformity with the terms of the contract or the Act of Parliament, as the case may be (o).

(f) *Whittaker v. Howe*, 3 Beav. 383; *Whitwham v. Moss*, 73 L. T. 57.

(g) *Taylor v. Davis*, 4 L. J. Ch. 18; 7 L. J. Ch. 178; 3 Beav. 288, n.

(h) *Greatrex v. Greatrex*, 1 De G. & S. 692.

(i) *Foundling Hospital v. Garrett*, 47 L. T. 230.

(k) *Lord Mexborough v. Bower*, 7 Beav. 127, *affd.* 2 L. T. O. S. 205. See *Powell v. Aiken*, 4 K. & J. 355.

(l) *Foster v. Birmingham, Wolverhampton, and Dudley Railway Co.*, 2 W. R. 378.

(m) *Hood v. North Eastern Railway Co.*, 5 Ch. 525, 1 Set. 704. Comp. *Philipps v. Great Western Railway Co.*, 7 Ch. 415; *Turner v. London and South Western Railway Co.*, 17 Eq. 561.

(n) *Warden of Dover Harbour v. South Eastern Railway Co.*, 9 Ha. 493; *London, Chatham, and Dover Railway Co. v. Bull*, 47 L. T. 415.

(o) *Lord Manners v. Johnson*, 1 C. D. 680; *Macmanus v. Cooke*, 56 L. J. Ch. 662. See *Storer v. Great Western Railway Co.*, 2 Y. & C. C. 48; *Child v. Douglas, Kay*, 577;

It is now settled that a mandatory injunction may be framed in the form of a positive and direct order upon the defendant to do the act required (*p*).

Chap. X.
Sect. 2.

A man, however, who seeks a mandatory injunction must use due diligence in making the application (*q*). In a case where a building had been erected by defendant's predecessor in title in breach of covenant, and had been allowed to stand for five years, the Court would not interfere by mandatory injunction to order it to be pulled down (*r*). The Court will seldom interfere to pull down a building which has been erected without complaint (*s*).

Instead of granting an injunction the Court may, when it is satisfied that such a course will be justified by the circumstances of the case, substitute damages for an injunction (*t*). But a man may by acquiescence in a breach of covenant not only deprive himself of his right to an injunction but of his right to recover damages in substitution for an injunction, or even nominal damages (*u*).

SECTION II.—INJUNCTIONS IN AID OF SPECIFIC PERFORMANCE.

A COURT of equity has jurisdiction pending a suit for specific performance to restrain the vendor from alienating or affecting by other acts the subject-matter in litigation. Whether or not the jurisdiction will be exercised depends on the special circumstances of the case. If there is a clear, undisputed contract, the Court will not permit the vendor to transfer the legal estate to a third person (*x*). But if the validity of the contract is open to doubt, the question whether the vendor shall be

Bowes v. Law, 9 Eq. 636; *Price v. Bala, &c., Railway Co.*, 50 L. T. 788.

(*p*) *Jackson v. Normanby Brick Co.*, (1899) 1 Ch. 438 (C. A.). See further as to mandatory injunctions, *ante*, pp. 31—34.

(*q*) *Ante*, p. 33.

(*r*) *Gaskin v. Balls*, 13 C. D. 324, 328 (C. A.).

(*s*) *Ib.*

(*t*) *Leader v. Moody*, 20 Eq. 154.

(*u*) *Kelsey v. Dodd*, 52 L. J. Ch. 34.

(*x*) *Hadley v. London Bank of Scotland*, 3 D. J. & S. 63.

Chap. X.
Sect. 2.

permitted to transfer the legal estate to a third person, pending a suit for specific performance, becomes a question of comparative convenience or inconvenience. If on the one hand greater inconvenience would arise to the plaintiff from withholding the injunction than to the defendant from granting it, an injunction will be granted (*y*). If, on the other hand, greater inconvenience would arise to the defendant from granting the injunction than to the plaintiff from withholding it, an injunction will not be granted (*z*). Where, however, the legal estate is outstanding, an injunction to restrain the vendor from dealing with the property is unnecessary. It is sufficient in such a case for the purchaser to register the suit as a *lis pendens* (*a*).

In a case in which the unpaid vendor of land taken by a railway company had brought an action to enforce his lien and an order had been made declaring the plaintiff entitled to a lien and directing the purchase money to be paid on or before a certain day, the defendants having made default in complying with the order, and there being evidence that the land was unsaleable, the Court granted an injunction restraining the defendants from running trains over the railway and from continuing in possession (*b*).

Relief may be given even against parties whose rights are independent of the contract. Thus, where the suit related to an agreement for the sale of a next presentation to a living, the Bishop of the Diocese was restrained from instituting, or in the case of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the plaintiff (*c*).

Mandatory order
for entry and
inspection, &c.

Where an agreement had been entered into for the sale of a house at a fixed price, and of the fixtures and furniture at a valuation by a person named by the parties, but the

(*y*) *Ib.*; *Preston v. Luck*, 27 C. 3 D. J. & S. pp. 69, 70.
D. 497.

(*z*) *Hadley v. London Bank of Scotland*, 3 D. J. & S. 63. (*b*) *Allgood v. Merrybent and Darlington Railway Co.*, 33 C. D. 571.

(*a*) See 2 & 3 Vict. c. 11; and see (*c*) *Nicholson v. Knapp*, 9 Sim. 326.
Hadley v. London Bank of Scotland,

vendor refused him permission to enter the premises for the purpose of valuation, a mandatory order was made to compel the vendor to allow the entry to enable the valuation to proceed (d). So also where serious injury might be done to property, the subject of the action, unless the defendant acted in a particular manner, which he could do with comparatively little trouble and risk, but which the plaintiff could not do at all, as where a colliery would be flooded, unless the person in possession under an agreement for a lease continued to pump, the interim preservation of the property was secured by the issue of a mandatory injunction, restraining the defendant from ceasing to act in that particular manner, *e.g.*, pump out water (e).

(d) *Smith v. Peters*, 20 Eq. 511.

(e) *Strelly v. Pearson*, 15 C. D. 113; Ord. L. 3.

CHAPTER XI.

INJUNCTIONS AGAINST THE DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS, PAPERS, SECRETS, ETC., ETC.

Chap. XI.

THE Court will, in the exercise of its equitable jurisdiction to correct abuse of confidence, restrain by injunction the disclosure of confidential communications, papers, and secrets. In all cases where a confidential relationship can be shown to exist, the Court fastens an obligation on the conscience of the party who has derived any confidential communication through that relationship, and will enforce it against him in the same manner as it enforces against a party, to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred (*a*). Upon this principle, persons into whose possession, or to whose knowledge, papers, documents, copies of books, &c., have come in the course of their employment, *e.g.*, solicitors, agents, accountants, merchants' clerks, assistants, &c., will be restrained from making them public or communicating their contents to a stranger (*b*). The obligation extends to those who have acquired their information at second hand from such persons (*c*). So also where a man was employed to take copies of a picture, he was restrained by injunction from keeping for his own use or selling any of the copies (*d*). The

(*a*) *Morison v. Moat*, 9 Ha. 255.

(C. A.).

(*b*) *Beer v. Ward*, Jac. 80; *Yovatt v. Winyard*, 1 J. & W. 394; *Lewis v. Smith*, 1 Mac. & G. 417; *Williams v. Prince of Wales Life Assurance Co.*, 23 Beav. 340; *Mellor v. Thompson*, 31 C. D. 55; and see the judgment of Hawkins, J., in *Robb v. Green*, (1895) 2 Q. B. 1. See also *Lamb v. Evans*, (1893) 1 Ch. 219

(*c*) *Tipping v. Clarke*, 2 Ha. p. 393; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Russell v. Jackson*, 9 Ha. 391; *Robb v. Green*, (1895) 2 Q. B. p. 16.

(*d*) *Tuck v. Priester*, 19 Q. B. D. 629 (C. A.); *Pollard v. Photographic Co.*, 40 C. D. 345.

protection which is given by the Court to all who have employed any person in a confidential way in their affairs does not, however, extend to cases where a fraudulent transaction has come to the knowledge of such other person in the course of his employment (*e*). "An employer," said Lord Hatherley (*f*), "can have no property in iniquitous secrets." Nor does the principle apply to cases where a man gets information of matters not connected with transactions in respect of which he has been engaged, and threatens to publish it (*g*).

The rule which protects from disclosure confidential communications between solicitor and client does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases in which, at least, equal confidence is reposed; in the cases, for instance, of the medical adviser and the patient, and of the clergyman and the prisoner. It rests not only upon the confidence itself, but upon the necessity of carrying it out. It is for the interests of justice that the most full, free, and complete communication should take place between a client and his solicitor, for if that did not take place, it would be impossible to conduct a suit or to obtain justice, or for a man to defend himself and to prevent an injustice (*h*). The privilege is not confined to litigation actually commenced or in contemplation, but extends to all communications which pass between them in the cause, and for the purposes of the business (*i*). A solicitor may not, after the determination of a suit, disclose any confidential communications made during its progress (*k*). The privilege does not terminate with the death of the client, but belongs after his death to persons claiming under him as against parties claiming adversely to him; but it does not belong to executors as against the next of kin, nor to one of two parties claiming under the client rather than to the other, but, following the

Privilege
between solicitor
and client.

- (*e*) *Gartside v. Outram*, 3 Jur. N. S. 40. 91; *Ainsworth v. Wilding*, (1900) 2 Ch. p. 321.
 (*f*) *Ib.* (*i*) *Herring v. Cloberry*, 1 Ph. 91.
 (*g*) *Tipping v. Clarke*, 8 L. T. 554. See *Thompson v. Falk*, 1 Drew. 25.
 (*h*) *Greenough v. Gaskell*, 1 My. & K. 98; *Russell v. Jackson*, 9 Ha. 335.
 (*k*) *Biggs v. Head*, Sau. & Sc.

Chap. XI.

legal interest, is subject to the trusts and incidents to which the legal interest is subject (*l*). The privilege is limited to communications of a solicitor with his client and those persons necessarily employed under the solicitor, and does not extend to communications between a solicitor and third parties (*m*).

In the exercise of its jurisdiction by injunction the Court draws a distinction between cases where a solicitor voluntarily makes a communication of what has come to his knowledge in the course of his professional employment and cases where he is required to disclose what he knows by giving evidence before a Court of justice (*n*). In the one case the Court will interfere by injunction (*o*). In the other case it will not interfere (*p*).

The existence of an illegal purpose will prevent any privilege from attaching to the communications between a solicitor and client (*q*).

As a general rule, a document once privileged is always privileged (*r*). But the privilege is that of the client, "and not the privilege of the confidential agent" (*s*); and accordingly it may be waived by the client (*t*). The privilege will be enforced, at the instance of the client, as well against the solicitor's clerk (*u*) or partner (*x*) as against the solicitor himself.

Injunctions to
restrain the
employment of a
man as solicitor.

With the further view to the protection of a client from the disclosure of confidential communications, the Court will not, it seems, permit a solicitor who has been employed by one party to a suit to act for another party to the same suit, either in that suit or in a transaction which flows out of it and is clearly connected with it, against his former client (*y*); and in

- (*l*) *Russell v. Jackson*, 9 Ha. p. 393. *Goldstone v. Williams, Deacon & Co.*, (1899) 1 Ch. 51, 52.
 (*m*) *Ford v. Tennant*, 32 Beav. 164. (*s*) *Anderson v. Bank of British Columbia*, 2 C. D. p. 649, *per* Jessel, M.R.
 (*n*) *Beer v. Ward*, Jac. 77. (*t*) *Ib.*; *Calcraft v. Guest*, (1898) 1 Q. B. p. 761; *Procter v. Smiles*, 55 L. J. Q. B. 527.
 (*o*) *Lewis v. Smith*, 1 Mac. & G. 417. (*u*) *R. v. Upper Bodington*, 8 D. & R. 726.
 (*p*) *Beer v. Ward*, Jac. 77. (*x*) *Davies v. Clough*, 8 Sim. 262.
 (*q*) *Follett v. Jeffreys*, 1 Sim. N. S. 3; *Russell v. Jackson*, 9 Ha. 389; *Bullivant v. Att.-Gen. for Victoria*, (1901) A. C. 196, 201. (*y*) *Little v. Kingswood Collieries Co.*, 20 C. D. 733, 742 (C. A.).
 (*r*) *Calcraft v. Guest*, (1898) 1 Q. B. p. 761 (*per* Lindley, M.R.);

such a case, if an injunction is not granted, the solicitor will be put under an undertaking not to communicate to his new client information acquired as solicitor for the former client (z). So also a solicitor who had been employed by a client to conclude an agreement on his behalf was restrained from acting as the solicitor of a person who had filed a bill to set aside the agreement, and from communicating to him any information relating to the agreement which came to his knowledge when acting as his solicitor (a). His partner was also restrained from acting as solicitor in the suit, although he had not joined the partnership till after the transaction relating to the agreement had taken place (b).

There is no distinction in this respect between the case of a solicitor who has been discharged and of one who declines to act. In neither case will he be permitted to act against his former principal (c). As already stated, the privilege does not terminate with the death of the client (d), and accordingly a solicitor was restrained, at the suit of the representatives of a deceased client, from acting as a solicitor for a creditor in whose name he had filed a bill to raise the amount of a judgment debt out of the estate of the deceased, although the creditor had been the client of the solicitor before he became concerned for the deceased (e).

The allegation of a solicitor that it is not in his power to communicate anything to his client which might injure the interests of his former client, or that he has not betrayed any confidence, will not prevent the injunction from issuing (f).

The injunction will issue, notwithstanding acquiescence for some time in the employment of the solicitor (g). The fact

(z) See *Little v. Kingswood Collieries Co.*, 20 C. D. 733, 741 (C. A.).

(a) *Davies v. Clough*, 8 Sim. 262; affirmed, ib. 269, n.

(b) *Ib.*

(c) *Cholmondeley, Earl, v. Clinton*, 19 Ves. 261, 275; *Little v. Kingswood Collieries Co.*, 20 C. D. 733 (C. A.).

(d) *Russell v. Jackson*, 9 Ha. p. 393. *Bullivant v. Att.-Gen. for Victoria*, (1901) A. C. 196.

(e) *Biggs v. Head*, Sau. & Sc. 335.

(f) *Ib.*; *Little v. Kingswood Collieries Co.*, 20 C. D. 733.

(g) *Hobhouse v. Hamilton*, Sau. & Sc. 359, n.

Chap. XI.

that the new client may suffer material inconvenience cannot be taken into consideration (h). The injunction goes to restrain the client from employing the solicitor, as well as the solicitor from being employed (i).

The principle will not, however, be carried so far as to impose a restraint which is not, in the opinion of the Court, necessary for the protection of the client. In *Brieheno v. Thorp* (k), the Court would not restrain the defendants from employing as their solicitor a gentleman who had been a clerk of the plaintiff's in the cause, but had, on the expiration of the time of his service, become a solicitor on his own account. So also, in the *Electric Power Co.* (l), it was held that a solicitor who had acted in the formation of a company and been discharged, might act for a petitioner to wind up the same company when all the facts upon which the petition was based might have been ascertained by any person in the position of the petitioner.

No privilege
between counsel
and client.

The principle upon which a solicitor who has acted for a party in a cause is restrained from acting afterwards for an opposing party in the same cause will not be extended to questions arising under the practice of retainer. A motion to restrain a counsel from acting as counsel for the plaintiff from whom he had received a retainer since his elevation to the rank of King's counsel, on the ground that he had drawn the answer to the bill on behalf of the defendants, was refused (m).

Trade secrets.

The name of a secret preparation may be used by anyone for goods actually prepared according to the recipe (n). Until the secret is discovered the goods of the original inventor or his successors can be the only goods to which the name is applicable, but if a person can discover the recipe, he can, it seems, use the name (o).

(h) *Ib.*

317.

(i) *Ib.*; *Little v. Kingswood Collieries Co.*, 20 C. D. 733.

(n) *Canham v. Jones*, 2 V. & B. 218.

(k) *Jac.* 303.

(o) *Siebert v. Findlater*, 7 C. D.

(l) 25 W. R. 603.

801; *Birmingham Vinegar Co. v.*

(m) *Baylis v. Grout*, 2 M. & K.

Powell, (1897) A. C. p. 717.

If a man who has a trade secret employs persons under a contract, either express or implied, or under a duty, express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer (*p*). In *Morison v. Moat* (*q*), the plaintiffs were the inventors of a secret medicine, and had communicated the secret to the father of the defendant, whom they took into partnership in consideration of his devoting all his time to the manufacture of the medicine. Previously to the secret being communicated to him he had entered into a bond never to divulge it, but, in violation of his bond, the defendant's father communicated it to the defendant. The Court restrained the defendant from selling the medicine under the name of that prepared according to the secret recipe, inasmuch as it was by the use of the name that he was availing himself of the breach of faith on the part of his father (*r*). Parties, however, in possession of a trade secret, who take a man into partnership without making any stipulation as to the trade secret, and permit him to acquire a full knowledge of the secret, will be considered to have waived their right to preserve the secret for their separate benefit (*s*).

When a man has, without unfair means, become acquainted with the secret of the preparation of an unpatented article, he may make use of his knowledge, and compound and sell the article himself in his own name, though it be the same as that of the proprietor of the secret, provided that he does not induce the public to believe that it was made by the proprietor of the secret or his representative, or that he is the successor in business of the proprietor of the secret (*t*).

The purchasers from the trustee of a bankrupt of his interest in a sauce, the secret of which they did not acquire, cannot have an injunction to restrain the original inventor from

(*p*) *Williams v. Williams*, 3 Mer. 354; *Hogg v. Darley*, 47 L. J. Ch. 567, W. N. (1878) 80.
 160; *Yovatt v. Winyard*, 1 J. & W. 394; *Morison v. Moat*, 9 Ha. 241, aff. 21 L. J. Ch. 248.

(*q*) *Morison v. Moat*, 9 Ha. 241, aff. 21 L. J. Ch. 248.

(*r*) 9 Ha. 241, aff. 21 L. J. Ch. 248.

(*t*) *Massam v. Thorley's Cattle Food Co.*, 14 C. D. 748.

(*r*) See *Leather Cloth Co. v. Lor-*

Chap. XI.

making the sauce, of which he alone knows the recipe, under the original title (*u*).

Upon the same principle (*x*) injunctions have been granted to restrain the use or publication of secret information obtained by a clerk or servant in the course of his employment, such as a list of the names and addresses of the plaintiff's customers copied from his books (*y*); a table of dimensions of machinery designed by the plaintiffs and collected from their plans by one of their draftsmen (*z*); materials for the construction of a book of advertisements collected by the plaintiff's canvassers (*a*); and of prints from a photographic negative which the defendants had been employed by the plaintiff to take (*b*).

The jurisdiction extends to enable the Court to restrain a third party from using secret information which has been to his knowledge obtained or communicated in breach of faith or contract. Thus, where under a contract information was supplied to the plaintiffs by the Stock Exchange and the same information was surreptitiously obtained by the defendant from a third person, the defendant was restrained from publishing it (*c*).

A motion to restrain a defendant from disclosing confidential information will be heard *in camerâ* where the object of the motion would be defeated by its being heard in open Court (*d*).

(*u*) *Cotton v. Gillard*, 44 L. J. Ch. 90.

(*x*) *I.e.*, implied contract. See *Pollard v. Photographic Co.*, 40 C. D. 345, *per North, J.*

(*y*) *Robb v. Green*, (1895) 2 Q. B. 1, 16; *ib.* 315; *Louis v. Smellie*, W. N. (1895) 115.

(*z*) *Merryweather v. Moore*, (1892) 2 Ch. 518.

(*a*) *Lamb v. Evans*, (1892) 3 Ch. 462; (1893) 1 Ch. 218.

(*b*) *Pollard v. Photographic Co.*, *ante*.

(*c*) *Exchange Co. v. Gregory*, (1896) 1 Q. B. 147 (C. A.); and see *Exchange Co. v. Central News*, (1897) 2 Ch. 48.

(*d*) *Mellor v. Thompson*, 31 C. D. 55 (C. A.).

CHAPTER XII.

INJUNCTIONS AGAINST THE PUBLICATION OF MANUSCRIPTS, LETTERS, AND OTHER UNPUBLISHED MATTER.

Chap. XII.

THE author or composer of a work of literature, science, or art, has, at common law, an absolute property in his work before publication (a). "The nature of the right of an author in his work before publication," said C. J. Erle, in *Jefferys v. Boosey* (b), "is analogous to the rights of ownership in other personal property. If he choose to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; if the wrongful copies have been published abroad, and the books imported for sale without knowledge of the wrong, the author's right to his composition would be recognised against the importer, and the sale would be stopped. These rights would be enforced for an alien as well as for a native author, in case his writings were copied wrongfully abroad and published. Again, if an author choose to impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment, either absolute or qualified, in any degree. He may lend, or let, or give, or sell, any of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits (c). If he prints for private circulation only, he still has the same rights and all

(a) *Jefferys v. Boosey*, 4 H. L. C. 979, per Lord St. Leonards; *Prince Albert v. Strange*, 1 Mac. & G. 42, per Lord Cottenham.

(b) 4 H. L. C. 867.

(c) See *Tuck v. Priestler*, 19 Q. B. D. 629 (C. A.).

Chap. XII.

these rights he may pass to his assignee" (d). "Every man," said Mr. Justice Yates, in *Millar v. Taylor* (e), "has a right to keep his own sentiments if he pleases; he has a right to judge whether he will make them public or commit them only to the sight of his friends. The manuscript is, in every sense, his own peculiar property, and no man can take it from him or make any use of it which he has not authorised, without being guilty of a violation of his property; and as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that privilege is guilty of a manifest wrong, and the Court has a right to stop it."

Grounds of
equitable
interference.

In restraining by injunction the publication of a manuscript or other unpublished matter, the Court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what in equity the Court considers and treats as a wrong, whether arising from a violation of an unquestionable right or from a breach of contract or confidence (f). The author or composer of an unpublished work is entitled to an injunction to restrain the publication, whether he does or does not intend to seek profit by future publication. It is in either case equally an interference with his property (g). The leading case on the subject is *Prince Albert v. Strange* (h). Her late Majesty and the Prince Consort had made certain etchings, and had certain lithographs struck off from them for their own use, and not for the purpose of publication: one of the impressions had been surreptitiously retained by one of the workmen employed in the operation, and had passed from his hands into the hands of a publisher, who declared his intention of publicly exhibiting the impression so improperly obtained, and also of selling a descriptive catalogue of the lithographs. Lord Cottenham restrained the publication of the catalogue as well as the exhibition of the impression upon the ground that,

(d) See *Mayall v. Higby*, 1 H. & Mac. & G. 42, per Lord Cottenham; C. 148; *Tuck v. Priestler*, 19 Q. B. and see *Pollard v. Photographic Co.*, D. 629 (C. A.). 40 C. D. 345, 354.

(e) 4 Burr. 2379.

(g) *Ib.* 2 Mer. 437, per Lord Eldon.

(f) *Prince Albert v. Strange*, 1

(h) 1 Mac. & G. 25.

as the etchings were the exclusive property of the plaintiff, no one had, without his consent, the right to make any use whatever of them, either by publishing a catalogue of them or otherwise. The order directed the copies of the impression and the catalogues to be delivered up (i).

The exclusive right which the author or composer of any Publication. work of literature, science, or art has at common law in his work ceases upon publication. After publication the right exists only by statute (k). Unless the right be secured by statute, any man may, after publication, copy a work whether for publication or otherwise (l). What amounts to a publication so as to defeat the common law right, is a question of some nicety. The publication of a work for private purposes and private circulation, and the gift of a few copies to friends, is not a publication (m). Nor is the printing of 100 copies of a report on a proposed company and showing or giving some of them to persons interested in floating the company (n). Nor is the representation of an unprinted work or manuscript play upon the stage a publication which will deprive the author or his assignee of his right of property therein (o). Nor is the exhibition of a picture at a public exhibition or gallery, where copying is expressly or impliedly forbidden, or the exhibition of a picture for the purpose of obtaining subscribers to an engraving, a publication (p). Nor is the delivery of a lecture to an audience of persons admitted upon the payment of a fee or reward, a publication (q). To

(i) See also *Turner v. Robinson*, 10 Ir. Ch. 121, 510; *Mayall v. Higby*, 1 H. & C. 148; *Hamilton v. Hector*, 13 Eq. 511; *Pollard v. Photographic Co.*, 40 C. D. 345, 354.

(k) *Jefferys v. Boosey*, 4 H. L. C. 815; *Reade v. Conquest*, 9 C. B. N. S. 755.

(l) See *Magdalen College v. Ward*, 1 Co. C. C. t. Cot. 265; *Turner v. Robinson*, 10 Ir. Ch. 121, 510.

(m) *White v. Geroch*, 2 B. & Ald. 298; *Prince Albert v. Strange*, 2 De G. & Sm. 686, 1 Mac. & G. 42;

Jefferys v. Boosey, 4 H. L. C. 815; as to what amounts to publication, see further *Blank v. Footman*, 39 C. D. 678.

(n) *Kenrick v. Danube Collieries Co.*, 39 W. R. 473.

(o) *Macklin v. Richardson*, Amb. 694; *Palmer v. De Witt*, 7 American R. 480; *Tompkins v. Halleck*, 43 American R. 480.

(p) *Turner v. Robinson*, 10 Ir. Ch. 121, 510. But see *Dalglish v. Jarvie*, 2 Mac. & G. 231.

(q) *Abernethy v. Hutchinson*, 3 L.

Chap. XII.

be a publication, there must be a publication of the thing itself, and not of a mere copy. The mere publication, for instance, of a bust is not a publication of the statue from which the bust is taken, nor is the publication of a wood engraving a publication of the picture from which it is taken (*r*).

Transfer of
the right.

The right to unpublished matter passes with the transfer of the subject (*s*); but the mere parting with the possession of a manuscript is not of itself sufficient proof of an intent to part with the ownership of the intellectual contents. Thus the giving of a manuscript copy of Lord Clarendon's history to be used as the donor should think fit, was held not to authorise the publication (*t*); and the possession of letters by the person to whom they are addressed does not take away from the writer the right to publish them (*u*). In Mr. Southey's case, Lord Eldon seemed to think that the circumstance of a manuscript being left for a long time in the hands of a publisher without inquiry, authorised the inference that he had abandoned his own right as an author, and he refused upon this and other grounds to interfere until the establishment of the right at law (*x*). The opinion of Lord Eldon in this case is opposed to the authority of the *Duke of Queensberry v. Shebbeare*, and does not seem sound. The true rule upon the subject appears to be that when consent is not proved, the negative is implied as a tacit condition (*y*). Most of the cases proceed upon this principle. In *Folsom v. Marsh* (*z*), Mr. Justice Story held that unless there be an unequivocal dedication by the author of his papers or letters, either to the public or to some other person, he has the exclusive property therein.

Right passes
upon death
of author to
personal
representatives.

The right in manuscripts or other unpublished matter passes to the legal personal representatives of the author or

J. Ch. 209, 1 H. & Tw. 28; *Caird v. Sime*, 12 App. Ca. 326.

(*r*) *Turner v. Robinson*, 10 Ir.

Ch. 121, 510.

(*s*) *Ib.*

(*t*) *Duke of Queensberry v. Shebbeare*, 2 Eden, 329.

(*u*) *Pope v. Curl*, 2 Atk. 342.

(*x*) *Southey v. Sherwood*, 2 Mer.

438.

(*y*) *Per Willes, J., in Millar v. Taylor*, 4 Burr. 2330.

(*z*) 2 Story (Amer.), 100.

composer (a). The property descends to the personal representatives, though they have not a copy of the manuscript (b). In *Duke of Queensberry v. Shebbeare* (c), the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his "History of the Rebellion," which had been given by a former representative of the author to a person under whom the defendant claimed, but not with the intention that he should publish. After the death of an author, his personal representatives may publish or assent to the publication of writings which he never intended to publish (d). If, however, he had expressly forbidden the publication, the Court might perhaps interfere (e).

The right in an unpublished manuscript belongs exclusively to the author, and cannot be seized by the creditors so as to entitle them to publish it (f). Bankruptcy of author.

In several cases where an unpublished work appeared to be of an irreligious, seditious, or libellous character, Lord Eldon would not interfere, at the suit of the author, to restrain its publication, until the legal right had been established (g). The principle, however, on which these cases proceeded does not appear sound. The right of an author in his manuscript before publication is, it is submitted, an absolute and exclusive one, and cannot be affected by the nature of the contents. The nature and the character of a work are fit considerations for the Court in determining whether it ought to be protected after publication under the statutory law of copyright (h), but should not be gone into where a man is illegally deprived of an absolute and exclusive right of property (i). Manuscript of an irreligious, &c., nature.

A man who agrees to write a manuscript in such a form for The purchaser of a manuscript

(a) *Thompson v. Stanhope*, Amb. p. 68; *Curtis on Copyright*, 85; 737; *Burnett v. Chetwode*, 2 Mer. Copinger, 176.

441 n.; *Dodsley v. M'Farquhar*, Mor. Dict. of Dec. 19, 20, 8308. (g) *Walcot v. Walker*, 7 Ves. 2; *Southey v. Sherwood*, 2 Mer. 438;

(b) *Millar v. Taylor*, 4 Burr. 2397, per Lord Mansfield. *Lawrence v. Smith*, Jac. 471; *Murray v. Benbow*, ib. 474 n.

(c) 2 Eden, 329. (h) *Baschett v. London Illustrated Standard Co.*, (1900) 1 Ch. 73.

(d) *Dodsley v. M'Farquhar*, Mor. Dict. of Dec. 19, 20, 8308. (i) See *Oliver v. Oliver*, 11 C. B. N. S. 139.

(e) *Ib.*

(f) Bell, Com. on Scotch Law,

Chap. XII.
may alter it, as
he thinks fit.

another, as to enable the latter to publish it as his own composition, has no just ground of complaint if the latter mutilates the manuscript. In the absence of a contract, express or implied, reserving to the author a qualified copyright, the owner of an unpublished manuscript may alter it as he thinks proper (*k*). The allegation that the reputation of the author may suffer in consequence of the mutilation of the manuscript is not a ground for the interference of the Court (*l*).

Letters.

The principles on which the respective rights in letters addressed by one correspondent to another depend are analogous to those which govern in the case of other manuscripts. The receiver of a letter has a right to the possession of it, and may take proceedings at law for the recovery of it if it be taken out of his possession (*m*), but he has no right to publish the letter without the consent of the writer. A man by sending a letter to another gives him a right to read and keep the letter, but does not give him the right to publish its contents to the world. The writer of the letter has a right to control the act of publication, and to decide whether or not there shall be a publication (*n*).

The right of the writer of the letter has been called a right of property: the expression is perhaps not quite satisfactory, but, on the other hand, is sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is, at least, positive and definite. The word property means a substantial right or legal interest, as distinguished from mere considerations of feeling (*o*); and it has been said that it is upon this right of property, and not because letters are written in confidence, or because the publication of them may wound the feelings of the writer, that the jurisdiction of the Court is founded (*p*). It is immaterial

(*k*) *Cox v. Cox*, 11 Ha. 118.

(*l*) *Ib.* See *Clarke v. Freeman*, 11 Beav. 112.

(*m*) *Oliver v. Oliver*, 11 C. B. N. S. 139.

(*n*) *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402, 425; *Lytton v. Devey*, 54 L. J. Ch. 293;

Pollard v. Photographic Co., 40 C. D. p. 352.

(*o*) See *Gee v. Pritchard*, 2 Swanst. 402, 425.

(*p*) *Ib.*; 426, *per* Lord Eldon. *Sed quare*, see *Pollard v. Photographic Co.*, 40 C. D. p. 354.

whether or not the intended publication be for the purposes of profit: the writer has in either case a right to an injunction to restrain the publication (*q*). The right descends to the legal personal representatives of the writer (*r*).

If the letters are returned to the writer by the receiver, the right of possession of them is then abandoned; and if the receiver has kept copies he cannot publish them without the writer's consent (*s*). The editor of a newspaper, to whom letters are sent for insertion in the paper, may not publish them if, before publication, the writer wishes to withdraw them (*t*).

The right of the writer of a letter to restrain the person to whom it is addressed from publishing it, is however not absolute, but is liable to qualification. The receiver of a letter may publish it when it is necessary for the purposes of justice publicly administered in the ordinary mode of proceeding, or to vindicate his character from an accusation publicly made by the writer (*x*).

Qualification of
the right of the
writer in letters.

The letter of an agent or a servant, for instance, written on behalf of or by the direction of the principal or the master, is the property of the principal or the master, and not of the agent or servant: the latter has no such property in it as to entitle him to prevent its publication, although he swears it was written in his private capacity; and the rule is apparently the same even when the letter has been only apparently written on behalf of the principal or master (*y*).

The Government has a right to publish or to withhold from principles of public policy, according to the exigencies of the

(*q*) *Ib.*; 415. See as to form of order of injunction, 1 Set. 684.

(*r*) *Thompson v. Stanhope*, Amb. 739; *Earl of Granard v. Dunkin*, 1 Ba. & Be. 207.

(*s*) *Thompson v. Stanhope*, Amb. 739; *Gee v. Pritchard*, 2 Swanst. 418.

(*t*) *Davis v. Miller*, 17 Dec. of Court of Sessions, 2nd series, 1166. See 1 Jur. N. S. App. 523.

(*u*) *Perceval v. Phipps*, 2 V. & B. 25; *Gee v. Pritchard*, 2 Swanst.

413; *Lytton v. Devey*, 54 L. J. Ch. 293, W. N. (1884) 203. See *Hopkinson v. Lord Burghley*, 2 Ch. 447. Comp. *Palin v. Gathercole*, 1 Coll. 569.

(*y*) *Howard v. Gun*, 32 Beav. 462. See *Folsom v. Marsh*, 2 Story (Amer.), 100. See, as to the right of a solicitor to copies of letters relating to his client's business, *Re Thomson*, 20 Beav. 545; *Re Wheatcroft*, 6 C. D. 97.

Chap. XII.

public service, letters addressed to the public offices. Letters of this sort stand upon principles analogous to that which gives a private individual the right to publish the letters of his agent, and does not extend to make such letters common property to be published by any person who may see fit, without the sanction of the Government, nor to take away the property of the writer or his representatives (z).

Where a letter is written "without prejudice," the answer must also be treated as made without prejudice. Accordingly letters so written cannot be looked at, for the purpose of determining whether there is good cause for depriving a successful litigant of costs, without the consent of both parties (a).

Delay.

The application for an injunction should, if possible, be made before any expense has been incurred by the person sought to be restrained (b).

Lectures.

A lecturer or professor in a University who delivers orally in his class room lectures which are his own literary composition as part of his ordinary course to students who are admitted on the payment of a fee has a right of property in such lectures as a literary composition in the same manner as in the case of other manuscripts. The admission of persons to hear such a lecture affords no presumption that the speaker intends to give them a right to publish the information they may acquire (c).

When persons are admitted as pupils, or otherwise, to hear such lectures, it is upon the implied confidence and contract that they will not use any means to injure or to take away the exclusive right of the lecturer in his own lecture. The hearer may take notes for the purposes of his own information, but he may not publish them for profit (d). Accordingly, if a person attending such lectures either publishes them or furnishes another with the means of publishing them, the Court will

(z) *Folsom v. Marsh*, 2 Story 739. See *Gee v. Pritchard*, 2 Swanst. 425. (Amer.), 100.

(a) *Walker v. Wilsher*, 23 Q. B. D. 335, 337 (C. A.). (c) *Caird v. Sime*, 12 A. C. 326.

(b) *Thompson v. Stanhope*, Amb. 374. (d) *Ib., Nicols v. Pitman*, 26 C. D.

restrain such a publication as a violation of trust and confidence founded on contract or implied from circumstances (*e*).

The case, however, is different where a lecturer addresses himself to the public generally without distinction of persons or selection or restriction of his hearers. In such case it will be held that he has abandoned his ideas or words to the use of the public at large or in other words has published them (*f*).

The right of property in lectures, whether oral or written, has been, since the case of *Abernethy v. Hutchinson* (*g*), recognised by statute. The 5 & 6 Will. IV., c. 65, enacts that the author or assignee of lectures to be delivered in any school, seminary, institution, or other place shall have the sole right to publish them. The third clause declares that no person allowed, for a certain fee, reward, or otherwise, to attend or be present at any place shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only by reason of having leave to attend them. But the fifth clause provides that the operation of the Act is to be restricted to lectures of the delivery of which notice in writing shall have been given to two justices living within five miles of the place of delivery two days before the delivery thereof. And it is further provided that the Act shall not extend to any lecture or lectures delivered in any University, or public school or college, or on any public foundation, or by any individual, in virtue of, or according to, any gift, endowment, or foundation.

The Statute does not in any way interfere with or abridge the common law right, but leaves it as it was: nor are its provisions confined to cases in which the right would have been protected at common law, but extend to many cases in which according to that law delivery would have been equivalent to publication (*h*).

(*e*) 12 A. C. 326.

(*g*) 1 H. & T. W. 28; 3 L. J. Ch.

(*f*) *Caird v. Sime*, 12 A. C. (O. S.) 209.

p. 344; *Walter v. Lane*, (1900) A. C. (h) 12 A. C. p. 351.

p. 350.

CHAPTER XIII.

INJUNCTIONS AGAINST THE PUBLICATION OF LIBEL AND SLANDER OF TITLE.

Chap. XIII.

THE Court has jurisdiction to restrain by injunction the publication of a libel or the making of slanderous statements calculated to injure a man in his business and also a mere personal libel (a).

The jurisdiction, however, to restrain on interlocutory application the publication of a libel is of a delicate nature, and must be exercised with caution (b). There are cases in which it would be quite proper to exercise the jurisdiction, as, for instance, in the case of an atrocious libel wholly unjustified and inflicting serious injury on the plaintiff. But, on the other hand, where there is a case to try and no immediate injury to be expected from the further publication of the libel, the Court will be unwilling to interfere by interlocutory injunction (c). The jurisdiction will not, as a general rule, be exercised unless the Court is satisfied that the statement in the libel is untrue, and that the publication proposed to be restrained is of such a character that any jury would find it libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable (d). Still more caution is requisite where the document is *prima facie* a privileged communication, so as not to be actionable unless express malice is proved, the question of malice being

(a) See *Monson v. Tussaud*, (1894) 1 Q. B. 671 (C. A.); and see *ante*, p. 6.

(b) *Salomons v. Knight*, (1891) 2 Ch. 294 (C. A.); *Monson v. Tussaud*, *ante*.

(c) *Quartz Hill, &c., Mining Co.*

v. Beall, 20 C. D. p. 508; and see *Salomons v. Knight* and *Monson v. Tussaud*, *ante*.

(d) *Coulson v. Coulson*, 3 T. L. R. 846; *Bonnard v. Perryman*, (1891) 2 Ch. 269, 284 (C. A.).

one which cannot be satisfactorily tried on interlocutory application (e). Chap. XIII.

In a case where a solicitor acting for some shareholders in a company printed and circulated, but only among shareholders, a circular containing very strong reflections on the mode in which the company had been brought out and on the conduct of the promoters and directors, and proposing a meeting of shareholders to take steps to promote their interests, the Court not being satisfied that the statements in the document were false or malicious would not interfere by interlocutory injunction (f). Defamatory statements in the case of companies.

The Court will not grant an interlocutory injunction which will restrain the fair discussion in a newspaper of matters of such importance as that of the probable success or failure of a public company; although if anything is published in a newspaper which is grossly libellous, there is ground for an injunction. A newspaper occupies a peculiar position, especially with regard to matters of public interest which concern those among whom the paper circulates, such as the position and prospects of a public company (g).

Nor will the Court grant an injunction with reference to the publication in future of statements in respect to which the Court cannot possibly decide whether a jury would find them to be libellous or not (h). In a case where a trading company claimed an interlocutory injunction to restrain the publication in a newspaper of letters and statements in the future similar to those which had been already inserted in the same newspaper reflecting on the solvency and financial condition of the company, the Court would not interfere, on the ground that it would be almost, if not entirely, impracticable so to frame the injunction as not possibly to include in its terms something

(e) *Quartz Hill, &c., Mining Co. v. Beall*, 20 C. D. p. 509; *Société &c., de Glaces v. Tilghman's, &c., Co.*, 25 C. D. 1; *Poulett v. Chatto*, W. N. (1887) 192.

(f) *Quartz Hill, &c., Mining Co. v. Beall*, 20 C. D. 501 (C. A.).

(g) *Liverpool, &c., Stores Association*

v. Smith, 37 C. D. 170 (C. A.).

(h) *Liverpool, &c., Stores Association v. Smith*, 37 C. D. 170 (C. A.); and see *Plumbly v. Perryman*, W. N. (1891) 64, where North, J., said the action ought to be transferred to the Q. B. D. for trial before a jury.

Chap. XIII.

that might not be libellous; and if an injunction were granted in terms confined to the publication of "libellous" letters, it would have to be decided on motion to commit whether what was published was libellous or not (i).

Nor will the Court interfere upon interlocutory application to restrain the further publication of a libel where the mischief, if any, has been done, and there is no intention on the part of the defendant to issue any more libellous statements (k).

Injunctions
against slander
of title.

The Court has jurisdiction to restrain a man from making slanderous statements calculated to injure another man in his business (l). The jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as respects oral statements (m). The Court will not, however, restrain by injunction the publication of statements which are in the nature of a slander of title or are to the injury of another in his trade, unless it is proved to the satisfaction of the Court that those statements are false to the knowledge of the party making them, or that they have not been made in the *bond fide* belief that they are true (n).

There is no threats action in respect of trade marks as there is in the case of patents. The publication in good faith of a statement that the plaintiff is infringing the defendant's trade mark, and that defendant intends to proceed against all persons dealing in the infringing goods cannot be restrained by injunction (o).

But disparaging statements calculated to injure the plaintiff's trade or to diminish the value of his goods, if not made in good faith, are actionable, and the continued publication of them after they have been shown to be untrue may be restrained (p), for they amount to trade libels or slander of title.

(i) *Liverpool, &c., Stores Association v. Smith*, 37 C. D. 170 (C. A.).

(k) *Quartz Hill, &c., Mining Co. v. Beall*, 20 C. D. 501, 509 (C. A.).

(l) *Collard v. Marshall*, (1892) 1 Ch. 571, 577; and see *ante*, p. 436.

(m) *Hermann Loog v. Bean*, 26 C. D. 306.

(n) *Halsey v. Brotherhood*, 15 C. D. 514, 19 C. D. 386; *Société, &c., de Glaces v. Tilghman's, &c., Co.*, 25 C. D. 1.

(o) *Colley v. Hart*, 6 B. P. C. 17.

(p) *Halsey v. Brotherhood*, 19 C. D. p. 392.

A fair warning to the public by a trader that he regards the conduct of another as an infringement, if made in good faith, is not libellous though it may turn out to be mistaken (*q*). So anyone who thinks his trade name is likely to be confused with another, may publish a warning that there is no connection between the two (*r*), and this notwithstanding the pendency of proceedings in which the right to use the name comes in question (*s*), but, pending such proceedings, one party may not say that the goods of the other party are spurious or not genuine (*t*).

A mere puff of the defendant's own goods or a statement that they are superior to those of a rival trader, even if untrue and made maliciously and the cause of damage to the latter, is not actionable (*u*). In an action in reference to a false statement disparaging a trader's goods (as distinguished from a personal libel) proof of special damage is essential (*x*), but evidence of a general falling off of business is admissible to prove such special damage (*y*).

The publication of a misleading report of a trade mark action or of an order made therein, may be a trade libel falling within the principle of the above cases (*z*).

In a recent case (*a*) an injunction was granted to restrain the publication of a false statement that the plaintiff bank was in liquidation.

In *Dockrell v. Dougall* (*b*) it was held that the plaintiff, a doctor, whose name had been used without his authority in an advertisement to puff the sale of a medicine, had no cause of action either for damages or for an injunction unless he could show that the publication was defamatory, or was injurious to him in his property or profession.

(*q*) *Dicks v. Brooks*, 15 C. D. p. 40. (*x*) *White v. Mellin*, (1895) A. C. 154; *Royal Baking Powder Co. v. Wright*, 18 B. P. C. 95.

(*r*) *Thorley's Cattle Food Co. v. Mussum*, 14 C. D. 763, 783. (*y*) *Ratcliffe v. Evans*, (1892) 2 Q. B. 524 (C. A.).

(*s*) *Coats v. Chadwick*, (1894) 1 Ch. 347. (*z*) *Hayward & Co. v. Hayward and Sons*, 34 C. D. 198.

(*t*) *Ib.*; but see *In re New Gold Coast, &c., Co.*, (1901) 1 Ch. 860. (*a*) *London and Northern Bank v. George Newnes, Ltd.*, 16 T. L. R. 76.

(*u*) *Hubbuck v. Wilkinson*, (1899) 1 Q. B. 86 (C. A.). (*b*) 80 L. T. 556 (C. A.).

Chap. XIII.

Interlocutory injunction.

The Court will not interfere by interlocutory injunction to restrain a trade libel unless it is satisfied that the statements are false (c), however much the balance of convenience may be in favour of staying the publication (d). The reluctance of the Court to interfere by interlocutory injunction in the case of trade libels is as strong as it is in the case of personal libels (e).

If in a judicial proceeding the statements in question have been proved to be false in fact, or to be libellous, an injunction will be granted against continuing them, as that would be proof of *mala fides* (f).

Patents, &c.,
Act of 1883,
s. 32.

Under the law as it existed before the Patent Act of 1883 a man who had a *bonâ fide* belief that he had a patent right might issue circulars or advertisements threatening legal proceedings against persons infringing it. It was immaterial that his belief was without foundation. It was enough that he had a *bonâ fide* belief that his allegations were true (g). But it is enacted by sect. 32 of the Patent Act of 1883, that where any person claiming to be patentee of an invention, by circulars, advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him and may obtain an injunction against the continuance of such threats, and may recover such damages, if any, as may have been sustained thereby, if the alleged manufacture, use, sale or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats; provided that this clause shall not apply, if the person making such threats with due diligence commences and prosecutes an action for an infringement of his patent (h).

(c) *Collard v. Marshall*, (1892) 1 D. 339.
Ch. 571.

(d) *Société Anonyme des Manufactures v. Tilghman's Co.*, 25 C. D. 1 (C. A.).

(e) *Champion v. Birmingham Vinegar Co.*, 10 T. L. R. 163.

(f) *Saxby v. Easterbrook*, 3 C. P.

(g) *Halsey v. Brotherhood*, 19 C. D. 386 (C. A.); *Driffeld v. Waterloo Mills*, 31 C. D. 638.

(h) 46 & 47 Vict. c. 57, s. 32. The threats of legal proceedings referred to in sect. 32, need not relate to acts already committed, but may also

A person threatened with an action has a right under the section to sue for an injunction to restrain the continuance of such threats, if the alleged patentee does not avail himself of the proviso by which the burden of taking proceedings is thrown upon him (*i*). If an action to test the validity of the patent or the fact of its infringement is honestly brought and prosecuted with due diligence against the person or any of the persons to whom the threats were made, the proviso is satisfied and the clause does not apply. It is not required by the proviso that the action should be brought against the person who is applying for an injunction against the threats (*k*). In considering whether an action is brought with "due diligence," the time of issuing the threats and not the time when the party bringing the action first knew of the acts which he alleges to be infringements is the period looked to (*l*).

Threats of legal proceedings for infringement of patent rights are actionable whether addressed to the infringer himself or intimated to a third person, and are none the less "threats" within the meaning of the section because they are made in answer to inquiries (*m*). In construing the expression in sect. 32, threats "by circulars, advertisements or otherwise," the words "or otherwise" are to be read not as being restricted to threats by measures *ejusdem generis* with "circulars or advertisements" but as extending the previous words so as absolutely to prohibit any threats whatever of legal proceedings, unless the case comes within either of the two saving clauses at the end of the section (*n*).

In an action to restrain threats of legal proceedings under sect. 35, no defence can be based upon the ground that what the defendant did was done *bond fide*, or that it was done on a privileged occasion (*o*).

In order that an action by the owner of a patent for the

be contingent warnings directed to future acts: *Kurz v. Spence*, 57 L. J. Ch. 238, 5 R. P. C. 161. See *Johnson v. Edge*, (1892) 2 Ch. 1 (C. A.)
 (*i*) *Driffield v. Waterloo Mills*, 31 C. D. 638; *Fairburn v. Household*, 2 Pat. Ca. Rep. 140.

(*k*) *Challender v. Royle*, 36 C. D. 425 (C. A.).

(*l*) *Ib.*

(*m*) *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 413 (C. A.).

(*n*) (1893) 1 Ch. 413, 419, 426.

(*o*) *Ib.*

Chap. XIII.

infringement of his patent should be "prosecuted with due diligence" within the meaning of the proviso to sect. 32, so as to exclude the operation of the former part of that section, it is not necessary that the infringement action should be prosecuted up to judgment. The plaintiff will not lose the protection of the proviso by reason of his discontinuing the action before trial upon discovering that he has no cause of action (*p*).

Where the proviso is satisfied, the section does not apply, and the case comes under the old law as it was before the Patent Act of 1883, and must be dealt with as if the section did not exist (*q*). Where accordingly a man brought an action under the section to restrain a patentee from issuing a circular intimating his intention to take legal proceedings against infringers of his patent, and the patentee thereupon brought an action against him, it was held, though the patent was proved on trial to be invalid, that the action against the patentee under the section should be dismissed, there being no evidence to show that at the time the circular was issued, the defendant had not a *bonâ fide* belief that he had a perfect legal right to the exclusive enjoyment of the patent (*r*).

The plaintiff in a threats action will, if successful, be entitled to an injunction and damages. In addition to the remedy of a perpetual injunction at the trial he may move for an interim injunction till the hearing (*s*). Such motion should not be made *ex parte*, but on notice (*t*). The Court will not, however, grant an interim injunction unless the plaintiff shows a strong *prima facie* case (*u*). It will not be conceded on a mere balance of convenience (*x*).

Chitty, J., held that a plaintiff in a threats action is not entitled to an interlocutory injunction unless he satisfies the

(*p*) *Colley v. Hart*, 44 C. D. 179.

(*q*) *Ib.*

(*r*) *Sharp v. Bruer*, 3 R. P. C. 193. As to the law in such cases before the Patents Act, 1883, see the judgment of Bowen, L. J., in *Skinner & Co. v. Shew & Co.*, (1893) 1 Ch. 422, 423.

(*s*) *Challender v. Royle*, 36 C. D. p. 436.

(*t*) *Wilson v. Church Engineering Co.*, 2 R. P. C. 175.

(*u*) *Société Anonyme v. Tilghman*, 25 C. D. 1 (C. A.).

(*x*) *Challender v. Royle*, *ante*; *Société Anonyme v. Tilghman*, 25

Court that he has not infringed the defendants' patent (y), but Kay, J., took a different view (z). The Court refused an injunction where the defendant gave an undertaking (a), and where an infringement action was pending (b). Chap. XIII.

During the pendency of an action for the infringement of a patent, the Court will not permit the plaintiff to issue circulars containing a positive statement that there has been an infringement (c).

An injunction to restrain a man from threatening the customers of the plaintiff with legal proceedings in respect of articles purchased by them from the plaintiff is not to be had *ex parte* (d).

In an action to restrain a man from threatening legal proceedings for the infringement of a patent, an order may be made on the application of the defendant that the plaintiff shall deliver particulars of matters in respect of which he alleges that threats have been made (e).

By the Corrupt and Illegal Practices Prevention Act, 1895, it is provided (in effect) that any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, may be restrained by interim or perpetual injunction from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purpose of granting an interim injunction *prima facie* proof of the falsity of the statement will be sufficient (f). Slander on
parliamentary
candidates

C. D. 1; *Howard v. Sykes*, (1897) L. Jo. 418; but see *Walker v. Clarke*, *infra*.

(y) *Barney v. United Telephone Co.*, 38 C. D. p. 397.

(z) *Walker v. Clarke*, 4 R. P. C. 111, 115.

(a) *Mackie v. Solvo Co.*, 9 R. P. C. 467.

(b) *Berliner v. Edison*, 16 R. P. C. 338.

(c) *Goulard v. Lindsay*, 4 R. P. C. 190, 56 L. T. 506.

(d) *Wilson v. Church, &c., Co.*, 2 R. P. C. 175.

(e) *Union Electrical, &c., Co. v. Electrical Power, &c., Co.*, 57 L. T. 791.

(f) 58 & 59 Vict. c. 40, ss. 1, 3; see *Bayley v. Edmunds*, 11 T. L. R. 537; and *Ellis v. National Union of Conservative Associations*, 44 Sol. J. 750.

CHAPTER XIV.

INJUNCTIONS AGAINST EXECUTORS.

Chap. XIV.

IF an executor or administrator through misconduct (a), insolvency (b), or bankruptcy (c), is bringing the property of the deceased into danger, an injunction will be granted to restrain him from getting in the assets, and a receiver will be appointed. If, however, a testator has selected an insolvent debtor as his executor, with full knowledge of his insolvency, the Court will not, on the bare fact of the insolvency alone, interfere and appoint a receiver (d); but where an executor becomes bankrupt after the death of the testator, the Court may restrain him from further acting, and if there is a co-executor who is willing to act, it is not necessary to appoint a receiver (e). The circumstance that an executor is poor and in mean circumstances, is not a sufficient ground for the interference of the Court (f), but an injunction will be granted where an executor or administrator is proved to be of bad character, drunken habits, and great poverty (g).

Parting with
assets.

The Court will not restrain an executor from parting with the assets unless a case of past or probable misapplication of them has been made out. Thus, when an annuity secured by a warrant of attorney had been granted, the Court would not, at the suit of the annuitant, restrain the executor of the grantor from paying simple contract debts before setting apart

(a) *Harrison v. Cockerell*, 3 Mer. Beav. 161.

1; *Colebourne v. Colebourne*, 1 C. D. 690.

(e) *Bowen v. Phillips*, (1897) 1 Ch. 174.

(b) *Scott v. Becher*, 4 Price, 346; *Mansfield v. Shaw*, 3 Madd. 100, n.

(f) *Hawthornthwaite v. Russell*, 2 Atk. 126, S. C. Barnard, Ch. 334;

(c) *Gladdon v. Stoneman*, 1 Madd. 143, n.

Howard v. Papera, 1 Madd. 142.

(d) *Stainton v. Carron Co.*, 18

(g) *Everett v. Prythergh*, 12 Sim. 365.

a fund to answer the future payment of the annuity (*h*). So also, where the only assets of a testator consisted of a devised real estate, which was liable to his bond for securing an annuity, and before the annuity had fallen into arrear the annuitant instituted a suit, alleging waste, and sought to restrain the executrix from selling or mortgaging the real estate, the Court refused to interfere (*i*). The principle upon which these cases proceeded was, that until an annuity is actually due there is no legal title, and the liability is only in contingency (*k*). Where, however, the liability in future is certain, the case is different, and the assets may not be parted with (*l*). But the Court will not interfere by injunction in favour of a creditor, unless it is shown that the assets are being wasted, or are in serious danger; nor will the Court interfere with the executor's right of retainer or of preferring a particular creditor (*m*). An injunction may be had to restrain an executor *de son tort* from parting with assets (*n*).

An injunction may be granted before probate on the application of a person appointed executor to restrain another person appointed co-executor from intermeddling with the estate and improperly dealing with it before probate (*o*).

Injunction
against a man
appointed
executor before
probate.

In *In re Parker* (*p*) it was held that where application is made for a receiver before probate, it should be made to the Probate Division. But this decision does not seem to have been followed in practice (*q*); and the more correct view appears to be that unless litigation is pending in the Probate Division the application for a receiver or an injunction may be made in the Chancery Division, notwithstanding that no probate or administration has been taken out (*r*).

(*h*) *Read v. Blunt*, 5 Sim. 567.

45 C. D. 569; *Re Stevens, Cooke v. S.*, (1898) 1 Ch. 162, 173.

(*i*) *Norman v. Johnson*, 29 Beav.

77; *Burrell v. Delevante*, 30 Beav. 553.

(*n*) *Re Lovett*, 3 C. D. 206; *Brand v. Mitson*, 24 W. R. 524.

(*k*) *Ib.*

(*o*) *Re Moore*, 13 P. D. 36.

(*l*) *King v. Malcott*, 9 Ha. 692;

(*p*) 54 L. J. Ch. 694.

Atkinson v. Gray, 1 Sm. & G. 577;

Ex parte Robinson's Executors, 6 D.

M. & G. 578, *per Knight Bruce*, L. J.

(*q*) See *In re goods of Moore*, (1892) P. 145; *Green v. Knight*, W. N. (1895) 69; and see *Salter v. S.*, (1896) P. 291 (C. A.).

(*m*) *Re Wells, Molony v. Brooks*,

(*r*) *Green v. Knight, ante.*

CHAPTER XV.

INJUNCTIONS BETWEEN PARTNERS.

Chap. XV.

THE Court has jurisdiction to restrain by injunction one or more members of a partnership firm from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner.

Injunction may be granted although dissolution not prayed.

An injunction will not be refused simply because a dissolution of partnership is not sought (a). "If," said Wigram, V.-C., in *Fairthorne v. Weston* (b), "it were the rule of the Court that a bill would in no case lie to compel a man to observe the covenants in a partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership or ruin him by a continued violation of the partnership contract" (c). Where, accordingly, a member of a partnership firm who had been suffering from temporary insanity had recovered, but was excluded by his co-partners from the management of the affairs of the partnership, they were restrained from preventing him from transacting the business of the partnership as a partner (d). So also, disputes having arisen among the partners in a partnership firm, formed for twenty-one years and determinable on twelve months' notice by either party, one of the partners was restrained from excluding his co-partner from the partnership business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his right under the

(a) *Fairthorne v. Weston*, 3 Ha. 387; *Watney v. Trist*, 45 L. J. Ch. 412.

(b) 3 Ha 387.

(c) See *Richardson v. Hastings*, 7

Beav. 301.

(d) *Anon.*, 2 K. & J. 441. See *Jones v. Lloyd*, 18 Eq. 265, as to the rights of an insane partner not so found.

partnership articles (e), and from applying any of the funds or effects of the partnership, otherwise than in the ordinary course of business, though no dissolution was sought (f). So also one partner was restrained from pulling down, altering, or adding to the partnership premises without the consent of the other partners (g).

In a recent case in which partnership articles provided that proper books of account should be kept by the managing partners, and that each partner should have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times, it was held that under this provision (as well as under sect. 24, sub-sect. 9 of the Partnership Act, 1890) any partner was entitled to have the books and accounts examined on his behalf by an agent appointed by him for the purpose, provided that the agent was a person to whom no reasonable objection could be taken by the other partners, the agent also undertaking not to make use of the information which he should thus acquire except for the purpose of confidentially advising his principal. An injunction restraining the defendants from preventing the exercise of this right by the plaintiff was accordingly granted (h).

Right of partner to have partnership books examined.

The Court will also restrain by injunction the exercise of a power of expelling a partner where such power is not exercised *bonâ fide* and in accordance with the partnership deed. But if the power is exercisable at the will and pleasure of the partner the Court has no jurisdiction to interfere (i). Where, however, the power is exercisable in the event of misconduct the Court will inquire whether it has been properly exercised or not (k).

(e) *Hall v. Hall*, 12 Beav. 414, 3 Mac. & G. 79; *Shrewsbury and Chester Railway Co. v. Shrewsbury and Birmingham Railway Co.*, 1 Sim. N. S. 423; *Warder v. Stillwell*, 26 L. J. Ch. 373.

(f) *Hall v. Hall*, 12 Beav. 414, 3 Mac. & G. 79. See *Gardner v. M'Cutcheon*, 4 Beav. 534.

(g) *Elmslie v. Beresford*, W. N. (1873) 152.

(h) *Bevan v. Webb*, (1901) 2 Ch. 59 (C. A.).

(i) *Russell v. Russell*, 14 C. D. 471, 479, 480.

(k) *Wood v. Wood*, L. R. 9 Ex. 190, 196.

Chap. XV.

In *England v. Carling* (l), where a partnership term had not expired, one of the partners who purported to retire from the partnership and entered into a new partnership for carrying on business of the same character and nature was restrained from carrying on such business with his new partners, or any other person than his old co-partners, until the expiration of the term; and from publishing or circulating any notice of the dissolution of the old firm, before the expiration of the term for which it had been entered into.

In *Aas v. Benham* (m) an injunction was granted restraining a partner from using the firm's name in a business carried on by him on his own account, though such business was so far beyond the scope of that of the firm that he was not bound to account for the benefit derived from it.

In the case of partnerships determinable at will, it is doubtful whether an injunction will be granted, if a dissolution be not prayed.

The Court will not, in general, interfere by injunction in the case of partnerships determinable at will if a dissolution is not prayed, for supposing the Court to interfere, the defendant might immediately dissolve the partnership (n). But the Court will not decline to interfere where the act complained of tends to the destruction of the partnership property, or where its interference might be of service in preventing the doing of an illegal act (o). In *Glassington v. Thwaites* (p), the plaintiff, who was one of the proprietors of a morning newspaper, obtained an injunction against his co-partners, who were also proprietors of another newspaper in which he had no interest, from publishing in the latter paper any information obtained at the expense of the former until it should have been published in the former. So in *Morris v. Colman* (q), one of the proprietors of a theatre was restrained from writing plays for other theatres in breach of the partnership articles (r).

Injunctions during or after

In a suit instituted for the purpose of having a partnership

(l) 8 Beav. 129.

(p) 1 Sim. & St. 124.

(m) (1891) 2 Ch. 244.

(q) 18 Ves. 437.

(n) See *Peacock v. Peacock*, 16 Ves. 49; *Leybourne - Popham v. Spencer Brown*, 9 T. L. R. 309.

(r) It does not appear from the reports of these cases, *Glassington v. Thwaites* and *Morris v. Coleman*, whether the partnerships were partnerships at will.

(o) See *Miles v. Thomas*, 9 Sim. 606, 609. See *Blisset v. Daniel*, 10 Ha. 493; *Lindley on Part.*, 527.

dissolved, or of having an account taken after a partnership has been dissolved, one or more of the partners will be restrained from doing any act which will impede the winding-up of the concern (*s*). In a suit for dissolution, a partner has been restrained from improperly interfering with or obstructing the partnership business (*t*); from accepting or negotiating bills for other than partnership purposes (*u*); from drawing, accepting, indorsing, or negotiating any bill of exchange in the partnership name (*x*); from getting in debts due to the firm (*y*); from drawing cheques in the name of the firm or taking any monies out of the capital of the partnership (*z*); from continuing to keep away from the firm a partnership book (*a*); and generally, on a dissolution, one partner will be restrained from doing an intentional serious damage to the property of the firm (*b*); so also a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (*c*); and they, on the other hand, will be restrained from making any improper use of the partnership property, the legal estate of which may be in them (*d*). So a surviving partner will be restrained from disposing of, or getting in, the partnership assets, if he has already made an improper use of the monies received by him (*e*).

In a case in which an action was pending for the dissolution of a partnership on the ground that the defendant was of unsound mind, the Court granted an injunction to restrain the defendant from interfering in the conduct of

(*s*) *Lindley*, 528.

(*t*) *Charlton v. Poulter*, 19 Ves. 147, n.; *Smith v. Jeyes*, 4 Beav. 503.

(*u*) *Williams v. Bingley*, 2 Vern. 278, n.

(*x*) *Jervis v. White*, 7 Ves. 413; *Hood v. Aston*, 1 Russ. 412. In *Jervis v. White* and *Hood v. Aston*, the injunction was extended to restrain indorsees for value with constructive notice from negotiating the securities.

(*y*) *Read v. Bowers*, 4 Bro. C. C. 440.

(*z*) *Lemann v. Berger*, 34 L. T. (O. S.) 235; 1 Set. 693.

(*a*) *Charlton v. Poulter*, 19 Ves. 147, n.; *Taylor v. Davis*, 7 L. J. Ch. 179; *Greatrex v. Greatrex*, 1 De G. & S. 692.

(*b*) *Marshall v. Watson*, 25 Beav. 501; *Turner v. Major*, 3 Giff. 442.

(*c*) *Elliott v. Brown*, 3 Sw. 489, n.; *Hawkins v. Hawkins*, 4 Jur. N. S. 1045.

(*d*) *Alder v. Fouracre*, 3 Sw. 489.

(*e*) *Hartz v. Schrader*, 8 Ves. 317.

Chap. XV.

the partnership affairs so as to injure the business and assets of the firm(*f*).

An injunction will in a proper case be granted to restrain a party from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement to refer(*g*). But the Court will not restrain a partner from proceeding to arbitration where it is satisfied that the result of the arbitration will be merely futile and productive of no injury to the plaintiff(*h*).

After dissolution either partner may in the absence of agreement carry on the business.

After the dissolution of a partnership any one of the partners may, in the absence of express agreement, carry on the same business in the old neighbourhood(*i*). Though a retiring partner may have assigned his interest and goodwill in the business to his co-partner, an agreement not to carry on the same trade will not be implied(*k*), unless there was an understanding to that effect on the sale of the business(*l*); but a retiring partner may not recommence or carry on business in such a way as to lead people to suppose that he is the successor of the old firm(*m*). He has, however, a right to say, in the absence of express agreement, that he lately belonged to a certain firm, and may advertise the fact(*n*), or may advertise that he is no longer connected with the concern(*o*). But a retiring partner who has assigned his interest to his co-partner may not solicit the customers of the old firm for business(*p*).

Injunctions in case of express agreements after dissolution.

A retiring partner who has entered into an express agreement not to carry on business will be restrained according to the terms of the covenant, provided the covenant be reasonable. Injunctions accordingly have been granted to enforce a covenant by a solicitor not to practise in any part of Great

(*f*) *J. v. S.*, (1894) 3 Ch. 72.

(*g*) *Kitts v. Moore*, (1895) 1 Q. B. 253 (C. A.).

(*h*) *Farrar v. Cooper*, 44 C. D. 323.

(*i*) *Cruttwell v. Lye*, 17 Ves. 335. See *Davies v. Hodgson*, 25 Beav. 117; *Trego v. Hunt*, 96 A. C. 15, 16.

(*k*) *Ib.*

(*l*) *Harrison v. Gardner*, 2 Madd. 198. See *Cooper v. Watson*, 3 Doug. 414, *Lindley on Part.*, 442.

(*m*) *Churton v. Douglas*, Johns. 174; *Hookham v. Pottage*, 8 Ch. 91.

(*n*) *Clark v. Leach*, 32 Beav. 14.

(*o*) *Bradbury v. Dickens*, 27 Beav. 53.

(*p*) *Trego v. Hunt*, *post*, p. 453.

Britain for 20 years (*q*), and to enforce a covenant not to get in the debts of the covenantor's late firm (*r*), and not to divulge a trade secret (*s*).

Chap. XV.

After dissolution of a partnership one of the partners may bring an action to restrain by injunction a clerk who had covenanted with him and his partner before dissolution not to carry on business within certain limits from acting in violation of his covenant, such a covenant being taken by the Court to be several as well as joint (*t*).

A name or partnership style is an asset of the partnership. Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, and without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not thereby expose his former partners to risk of liability (*u*). Whether there will be any such risk, is a matter to be determined with regard to the circumstances of each case as it arises (*x*).

Right to the use of the name or partnership style after dissolution.

Where the goodwill of a business is taken over on the dissolution of a partnership without any express stipulation against the retiring partner carrying on a similar business, he is at liberty to start in the same trade again under his own name, so long as he does not use it so as to mislead the public; but he cannot trade under the old name if it differs from his own name (*y*), and he will not be allowed to solicit the customers of the old firm (*z*). Where a continuing partner is at liberty to use the trade name of his late firm, he can only do so in a way which will not cast risk or liability on his late partners (*a*).

Where the goodwill of a business is assigned, without any

(*q*) *Whittaker v. Rowe*, 3 Beav. 383; and see *Turner v. Evans*, 2 D. M. & G. 740; *Turner v. Major*, 3 Giff. 443; *ante*, pp. 378, 379.

(*x*) *Ib.*

(*y*) *Churton v. Douglas, Johns*. 174; *Re David and Matthews*, (1899) 1 Ch. 378; *Cash v. Cash*, W. N. (1901) 46; W. N. (1902) 32.

(*r*) *Davis v. Amer*, 3 Drew. 64.
(*s*) *Morison v. Moat*, 9 Ha. 241; *ante*, pp. 425, 426.

(*z*) *Gillingham v. Beedlow*, (1900) 2 Ch. 242; *Jennings v. Jennings*, (1898) 1 Ch. 378.

(*t*) *Palmer v. Mallett*, 36 C. D. 411 (C. A.).

(*a*) See *Burchell v. Wilde*, (1900) 1 Ch. 551 (C. A.); and see also *Tounsend v. Jarman*, (1900) 2 Ch. 698.

(*u*) *Burchell v. Wilde*, (1900) 1 Ch. 551 (C. A.).

Chap. XV.

express assignment of the right to use the firm name, and such firm name consists of the name of the vendor with the words "and Co." added to it, the vendor runs no appreciable risk by the purchaser continuing the business under such firm name, and cannot therefore maintain an injunction to restrain such user (b).

In *Bradbury v. Dickens* (c), an author, who had been in partnership with a publisher, was restrained, after dissolution, from advertising that a certain publication would be discontinued, the right to use the name of the publication being partnership assets (d). Upon the dissolution of a partnership, and the sale of the business to one of the partners, the purchaser, where there is no agreement permitting him to use it, may be restrained from using the outgoing partner's name, as part of the style of the firm, unless the outgoing partner is dead or bankrupt (e), or unless it is used in such a way as not to expose the outgoing partner to risk of liability (f). In *Evans v. Hughes* (g), a surviving partner was restrained from carrying on business for three months after the decease of the other partner, under any style except that of the old firm, there being a stipulation in the articles of partnership that the representatives of a deceased partner might elect, within three months from his death, to take the deceased partner's share.

On sale of a business right to the name or style passes with it.

If the whole of a partnership concern and the goodwill of a business have been sold, the right to the name or partnership style, as a general rule, passes with it (h). So also although the goodwill of a business has not been assigned to him, a partner may have a right by implication under the deed of dissolution to carry on the business under the old name (i). But if the

(b) *Townsend v. Jarman*, (1900) 2 Ch. 698.

(c) 27 Beav. 53.

(d) See *Marshall v. Watson*, 25 Beav. 501.

(e) *Scott v. Rowland*, 20 W. R. 508.

(f) See *Burchell v. Wilde*, (1900) 1 Ch. 551 (C. A.).

(g) 18 Jur. 691.

(h) *Banks v. Gibson*, 34 Beav. 566; *Townsend v. Jarman*, (1900)

2 Ch. 698; *Trego v. Hunt*, (1896)

A. C. 7. See as to the meaning of "goodwill," *Austen v. Boys*, 2 D. & J. 626; and see *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Limited*, (1901) A. C. 223, 224.

(i) *Fenton v. Levy*, 79 L. T. Jo.

old name is used, it must be used in such a way as not to expose the outgoing partner to liability (*j*). Chap. XV.

It is now established that the vendor of the goodwill of a business is not entitled to canvass the customers of the old firm, and will be restrained from soliciting any of the customers of the old firm (*k*). The same principle is applicable although on the sale or transfer of the assets of a business the "goodwill" is not expressly mentioned (*l*).

The Court will not interfere in all cases of misconduct to grant an injunction against one partner at the suit of another. Misconduct,
and quarrels
of partners. Mere disagreements, or quarrels arising from bad temper and improprieties of conduct, are not a sufficient ground for the interference of the Court. But if a partner is conducting himself so grossly as to render it impossible for the business to be carried on in a proper manner, the Court will interfere (*m*). When partners have agreed that the management of their affairs shall be entrusted to one or more of them exclusively, the Court will not interpose, unless he or they is or are acting illegally, or in breach of the trust reposed in them, or have become insolvent (*n*). The Court will not interfere to restrain a partner from acting as such, merely because if he were known to be acting as partner the confidence of the public in the concern might be shaken (*o*). In *Anderson v. Wallace* (*p*), however, where a partnership firm was formed between several persons for the purpose of horsing a mail-coach, one of the partners was restrained from horsing it, on the ground that his horses were so bad as to imperil the business of the concern.

An injunction will be granted to restrain a person from Injunctions to
restrain a man

332; *Jennings v. Jennings*, (1898) 1 Ch. 378.

(*j*) *Burchell v. Wilde*, (1900) 1 Ch. 551 (C. A.).

(*k*) *Trego v. Hunt*, (1896) A. C. 7.

(*l*) *Jennings v. Jennings*, (1898) 1 Ch. 378.

(*m*) *Marshall v. Colman*, 2 J. & W. 268; *Smith v. Jeyes*, 4 Beav. 503; *Anderson v. Anderson*, 25

Beav. 190; *Baxter v. West*, 1 Dr. & Sm. 173.

(*n*) *Marshall v. Colman*, 2 J. & W. 268; *Goodman v. Whitcombe*, 1 J. & W. 589; *Waters v. Taylor*, 15 Ves. 10; *Roberts v. Eberhardt, Kay*, 160.

(*o*) *Anon.*, 2 K. & J. 441.

(*p*) 2 Moll. 540.

Chap. XV.
from holding
out another
as partner.

holding out another as a partner, against the wish and without the authority of that other (*q*). So also a company was restrained from advertising a certain person as their trustee without his authority (*r*).

In a recent case, in which a dealer in cycles had advertised his goods in a manner which satisfied the Court that he intended the public to believe that the plaintiffs (the proprietors of *The Times* newspaper) were either the vendors, for whom he acted as manager, or were partners, with him, or in some way connected with the sale of such cycles, it was held that as the plaintiffs were exposed to some risk by the unauthorised use by the defendant of the name of their newspaper, an interlocutory injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were offered for sale by the plaintiffs, and from in any way holding out *The Times* to be the owners of, or connected with his business (*s*).

Partner in a
patent may pub-
lish an account
of the invention.
A partner who
seeks relief must
do equity.

A partner in a patent will not be restrained from publishing a book containing an account of the invention (*t*). A partner who seeks to restrain his co-partner from violating the terms of a partnership agreement, or his duties as a partner, must be able to show that he is able and willing to perform his own part of the agreement, and has fulfilled the duties incumbent on himself (*u*). However improper the conduct of his co-partner may have been, a partner may, by his own acts, debar and preclude himself from relief in equity (*x*). Acquiescence in the act complained of may disentitle a partner to relief against his co-partners (*y*).

Difference of
principles on
which a receiver
is appointed and
an injunction
granted.

It may be observed that the appointment of a receiver in partnership cases always operates as an injunction, though the Court in granting or refusing an order for a receiver does not

(*q*) See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 De G. & S. 211.

(*r*) *Routh v. Webster*, 10 Beav. 561.

(*s*) *Walter v. Ashton*, (1902) 2 Ch. 282.

(*t*) *Hawkins v. Blackford*, 1 L. J.

Ch. 142.

(*u*) *Smith v. Fromont*, 3 Sw. 330; *Const v. Harris*, T. & R. 524.

(*x*) *Littlewood v. Caldwell*, 11 Price, 97.

(*y*) *Glassington v. Thwaites*, 1 Sim. & St. 125.

act upon the same principles as when it grants or refuses an order for an injunction. An injunction may exclude one of the partners from the management of the partnership affairs, but the appointment of a receiver excludes the plaintiff as well as the defendant, the Court taking upon itself, through the receiver, the management of the partnership affairs. It therefore does not follow that because the Court will grant an injunction it will also appoint a receiver, or that because it refuses to appoint a receiver it will also decline to interfere by injunction (z). The Court, however, will often grant an injunction as well as appoint a receiver, to mark its sense of the impropriety of the conduct of those whom it specially restrains (a).

(z) Lindley on Partnership, 525; (a) *Evans v. Coventry*, 3 Drew. Kerr on Receivers, 78. See *Evans* 82; Lindley, 525. v. *Coventry*, 5 D. M. & G. 911.

CHAPTER XVI.

INJUNCTIONS AGAINST TRUSTEES.

Chap. XVI.

Injunction
to restrain
improper sale
by trustee.

A TRUSTEE may not use the powers which the trust confers on him at law, except for the legitimate purposes of the trust. If he attempt to do so, the Court will restrain him by injunction (a).

In *Pechel v. Fowler* (b), a case in the Exchequer, it is said to have been held that a *cestui que trust* could not restrain an imprudent sale by a trustee for sale, because, as he might proceed against the trustee for the consequential damage, the injury was not irreparable, but Sir John Leach, under similar circumstances, granted an injunction (c), and other authorities show that the jurisdiction rests, not upon the irremediable nature of the mischief, but upon the breach of trust (d).

When a sale of trust property is conducted in such a manner, as to constitute as between the trustees, having the power of sale, and the *cestui que trust*, a breach of trust, the Court will at the suit of the *cestui que trust* restrain both the purchaser and the trustees from completing the sale (e). The smallness of the interest of the plaintiff and the fact that she was an infant, and that the suit might have been instituted from other motives, were held not to be sufficient reasons for refusing an injunction (f).

By the Trustee Act, 1893 (g), it is provided, in effect, that

(a) *Balls v. Strutt*, 1 Ha. 146; 903; and see *Dunn v. Flood*, 28 C. D. 586.
(b) *M'Fadden v. Jenkyns*, 1 Ph. 153.

(c) 2 Anst. 549.

(d) *Anon.*, 6 Madd. 10.

(e) *Att.-Gen. v. Corporation of Liverpool*, 1 M. & C. 210; *Att.-Gen. v. Aspinall*, 2 M. & C. 613; *Balls v. Strutt*, ante.

(f) *Dance v. Goldingham*, 8 Ch.

(g) *Dance v. Goldingham*, 8 Ch. 903.

(g) Sect. 14. This section re-enacts sect. 3 of the Trustee Act, 1888, and only applies to sales made after the 24th December, 1888.

no sale made by a trustee shall be impeached by a beneficiary upon the ground that the conditions are depreciatory, unless it appears that the consideration for the sale was thereby rendered inadequate; and that no sale made by a trustee shall, after execution of the conveyance, be impeached as against the purchaser upon the ground that the conditions were depreciatory, unless the purchaser was acting in collusion with the trustee (*g*).

A man who has a common interest with others in a trust fund, or trust estate, is entitled to sue on behalf of himself and the others, for the protection of the property, by injunction (*h*).

A trustee may bring an action against his co-trustee to prevent a breach of trust. If a breach of trust be threatened by a trustee, it is the duty of a trustee to prevent it by injunction (*i*).

Where an injunction has been granted against trustees and new trustees are appointed who with knowledge of the order do the act restrained by the injunction, they will be committed for contempt (*k*).

If a voluntary settlement be binding on the settlor, an injunction may be had to restrain the commission of any act by which the settlement may be defeated (*l*). A mere trust for the payment of debts, executed by a man behind the backs of his creditors, and without communicating with them, is not binding on the debtor, but he may, in general, revoke the authority given to the trustees, who are merely his agents. In a case where a man, having executed such a deed, afterwards varied the trusts of the deed, the Court would not interfere at the suit of a creditor under the first deed to restrain the trustees from executing the subsequent trusts (*m*). The case, however, is different if the creditor is a party to the arrangement (*n*), or if, though not a party to the arrangement, he has been told

Voluntary settlements may be enforced.

(*g*) For note (*g*) see p. 456.

(*h*) *Scott v. Becher*, 4 Price, 346; and see Ord. 16, rr. 36, 37.

(*i*) See *Re Chertsey Market*, 6 Price, 261, 279.

(*k*) *Avory v. Andrews*, 30 W. R. 565.

(*l*) See *Spottiswoode v. Stockdale*, Coop. 102; *Mackenzie v. Mackenzie*,

16 Ves. 372.

(*m*) *Walwyn v. Coutts*, 3 Mer. 707, 3 Sim. 14; *Bill v. Cureton*, 2 M. & K. 511; *Johns v. James*, 8 C. D. 744 (C. A.).

(*n*) *M'Kinnon v. Stewart*, 1 Sim. N. S. 76; *Montefiore v. Brown*, 7 H. L. 241.

Chap. XVI.

by the debtor that he may look to the property comprised in the deed for the payment of his demand (*o*). Where a man creates a trust for particular persons, and not for his creditors generally, it cannot be revoked (*p*).

Trust deeds for religious bodies.

The Court will enforce by injunction trust deeds for religious bodies, or for the purposes of education. If a living or the right of electing the incumbent of a parish, is vested in trustees, or a particular body, and an improper appointment is made, the Court will restrain by injunction, the trustees from presenting the person so appointed to the bishop for institution (*q*), and will also restrain the person so appointed, or any other person than the person properly appointed, from performing divine service in the church or chapel (*r*). So, also, if a man be elected or appointed minister of a dissenting chapel, improperly or not in the mode provided for by the deed of trust, the Court will, on a proper application being made, restrain him by injunction from officiating as pastor or intermeddling with the services and disturbing a pastor duly elected in the performance of divine service (*s*). So, also, if the minister or pastor of a chapel has been improperly dismissed, the Court will restrain the governing body from hindering him in the discharge of his office (*t*).

If ministers of dissenting chapels hold tenets differing from those of the founders, they will be restrained by injunction from preaching, although elected by a majority of the trustees or the congregation, as it is not in their power to alter the designed objects of the institution (*u*). So, also, the Court

(*o*) *Acton v. Woodgate*, 2 M. & K. 492; *Harland v. Binks*, 15 Q. B. 713; *Siggers v. Evans*, 5 E. & B. 367. See *Synnot v. Simpson*, 5 H. L. 145; *Johns v. James*, 8 C. D. 744 (C. A.).

(*p*) *New, Prance and Gurrard's Trustee v. Hunting*, (1897) 2 Q. B. 19, 25 (C. A.).

(*q*) *Carter v. Cropley*, 8 D. M. & G. 680.

(*r*) *Att.-Gen. v. Earl of Powis*, Kay, 886.

(*s*) *Perry v. Shipway*, 4 D & J. 353; *Cooper v. Gordon*, 8 Eq. 258.

See, as to form of order, 1 Set. 723.

(*t*) *Daugars v. Rivaz*, 28 Beav. 233; *Att.-Gen. v. Daugars*, 33 Beav. 621. See *Dean v. Bennett*, 9 Eq. 627, 6 Ch. 490.

(*u*) *Att.-Gen. v. Welsh*, 4 Ha. 572; *Att.-Gen. v. Munro*, 2 De G. & S. 122; *Att.-Gen. v. Murdock*, 1 D. M. & G. 86. See *Shore v. Att.-Gen.*, 9 Cl. & Fin. 355; *Att.-Gen. v. Hutton*, Dru. 480.

will, upon a proper case being made out, restrain a chapel from being used or enjoyed by persons not contemplated by the deed of foundation, and will restrain the minister from admitting to communion persons not contemplated by the deed of foundation (*x*). But if the majority of the congregation, or the trustees, have the power of varying the trusts, or doctrines, the Court will not interfere (*y*). In *Milligan v. Mitchell* (*z*), Lord Brougham would not extend the injunction to restrain the trustees from allowing persons not duly elected from officiating in the meantime.

In *Rigall v. Foster* (*a*), the trustees of a chapel were restrained from mortgaging it for a small sum without apparent necessity.

In a suit instituted by parishioners for the purpose of setting Parties. aside the nomination of a clerk to the bishop by the trustees of the advowson which had been vested in them by deed in trust for the parishioners, or in the case of a suit instituted by the minister of a dissenting body to restrain the trustees from removing him, or by the trustees or the congregation to restrain a minister improperly elected from officiating, the Attorney-General, it seems, need not be made a party. It is a question between trustee and *cestui que trust* and the suit may be by action, and need not be by information (*b*). So, also, the regulation of the establishment of a dissenting chapel, not possessing a fixed income, but supported only by voluntary contributions, is the proper subject of an action and not of an information (*c*). An individual should sue alone, where he alone is interested (*d*), but the suit must be on behalf of himself and all others who possess an interest in common with him, when others are interested with him (*e*). All who

(*x*) *Att.-Gen. v. Gould*, 28 Beav. 28 Beav. 233.
485.

(*y*) *Att.-Gen. v. Etherridge*, 32 L. J. Ch. 161. (c) *Davis v. Jenkins*, 3 V. & B. 151.

(*z*) 1 M. & K. 446.

(*a*) 18 Jur. 39.

(*b*) *Att.-Gen. v. Cuming*, 2 Y. & C. C. C. 149; *Carter v. Cropley*, 8 D. M. & G. 680; *Daugars v. Rivaz*, 28 Beav. 233.

(*d*) *Whiston v. Dean and Chapter of Rochester*, 7 Ha. 532; *Daugars v. Rivaz*, 28 Beav. 233.

(*e*) *Evan v. Corporation of Avon*, 29 Beav. 144; *Lang v. Purves*, 13 Moo. P. C. 389.

Chap. XVI.

Trust deed for
the appointment
of a school-
master.

sue must, however, have an interest in the subject-matter of the trust; mere strangers to the trust cannot sue (*f*).

The mode set forth in the instrument or deed of foundation or the trust deed, with respect to the appointment or removal of a schoolmaster, must in all cases be adhered to (*g*). If the founder of a school gives no directions as to the appointment or election of a schoolmaster, and appoints no visitor, he and his heirs, as patrons, have the appointment; but if the founder appoints a visitor, then the visitor is entitled to appoint a schoolmaster (*h*).

Removal of
schoolmaster.

Where trustees of a grammar-school have by the foundation deed power to remove a schoolmaster at their discretion, they may remove him without assigning any reason, so long as they do not act from corrupt to improper motives (*i*). But if the powers given to trustees to remove a schoolmaster are in the nature of trusts, the Court of Chancery will entertain jurisdiction, and prevent a corrupt or improper exercise of them (*k*). Thus, where trustees, with powers to remove a schoolmaster, deprive him of his office, from improper motives, because he had voted for a certain candidate at a particular election (*l*), or arbitrarily, without giving him an opportunity to answer the charges against him (*m*), the Court declared such removals void. In *Willis v. Childe* (*n*), power having been given to the trustees, under a scheme of the Court for the regulation of a grammar-school which had been founded by King Edward the Sixth, to remove the schoolmaster "upon such grounds as they shall in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just," Lord Langdale, being of opinion that the scheme of regulation did not confer on the trustees a power to dismiss the master arbitrarily upon any

(*f*) *Ib.*

(*g*) *Town of Salop v. Att.-Gen.*, 2 Bro. P. C. 402.

(*h*) *Att.-Gen. v. Lord Carrington*, 4 De G. & S. 140.

(*i*) *Reg. v. Darlington School*, 6 Q. B. 682; *Hayman v. Governors of Rugby School*, 18 Eq. 68.

(*k*) See *Gibson v. Ross*, 7 Cl. &

Fin. 241.

(*l*) *Dummer v. Corporation of Chippenham*, 14 Ves. 245.

(*m*) *Re Philipps' Charity*, 9 Jur. 959; *Re Fremington School*, 10 Jur. 512; *Fisher v. Jackson*, (1891) 2 Ch. 84.

(*n*) 13 Beav. 117.

grounds they might deem just, free from the control of the Court, granted an injunction to restrain the trustees from enforcing the dismissal and ejecting the master. In the same case at law (o), the Court of Exchequer had held that the trustees had a discretionary power; but Lord Langdale, nevertheless, granted the injunction.

A man who seeks the aid of the Court against the trustees of a charity to restrain them from removing him from his office need not obtain the sanction of the Charity Commissioners, unless the claim to such relief involves the administration of the trust (p). So also the governors of a charity school who have dismissed their schoolmaster may bring an action to restrain him from teaching at the school and remaining in possession of the school-house, without obtaining the sanction of the Charity Commissioners (q).

The jurisdiction of the Court over public schools, as respects the removal of a schoolmaster, does not apply to schools maintained by private funds. The mere incorporation of the trustees of a private establishment does not subject them to the same rules as those which affect public establishments (r). Nor has the Court jurisdiction where there is no trust, and the schoolmaster is only an officer of a corporation. If unjustly removed he must appeal to the visitors (s).

Where trustees disagree among themselves, so that the trust cannot be properly carried on without the assistance of the Court, a receiver will be appointed (t). So also, where one of the trustees is excluded by the others from taking part in administering the trust, this is a ground for the appointment of a receiver (u).

Disagreement
between
trustees.

(o) *Doe dem. Willis v. Childe*, 5 Exch. 894.

(p) *Rendell v. Blair*, 45 C. D. 139; *Fisher v. Jackson*, (1891) 2 Ch. 84; *Rooke v. Dawson*, (1895) 1 Ch. 480.

(q) *Holme v. Guy*, 5 C. D. 901.

(r) *Gibson v. Ross*, 7 Cl. & Fin. 241.

(s) *Whiston v. Dean and Chapter of Rochester*, 7 Ha. 532; *Att.-Gen.*

v. Sherborne Hospital, 18 Beav. 256. As to the power of removing schoolmasters under the Charitable Trusts Acts, 1853 and 1860, see 16 & 17 Vict. c. 137, s. 22, and 23 & 24 Vict. c. 136, s. 14.

(t) *Wilson v. Wilson*, 2 Ke. 249; *Hart v. Denham*, W. N. (1871) 2; *Bagot v. Bagot*, 10 L. J. Ch. 116; *Swale v. Swale*, 22 B. 584.

(u) *Swale v. Swale*, *ante*.

CHAPTER XVII.

INJUNCTIONS BETWEEN MORTGAGOR AND MORTGAGEE.

Chap. XVII.
Mortgagee's
right to pursue
his remedies
concurrently.

As long as anything remains due on the mortgage security a mortgagee may pursue all his remedies concurrently. He may bring actions of covenant and ejectment, and may at the same time proceed to foreclose the mortgage (a). If he forecloses and afterwards sues on the covenant to pay, he thereby opens foreclosure; but if he sues on the covenant and does not get fully paid, he may still go on and foreclose the mortgage. But if he has been fully paid by means of his personal remedy under the covenant, he cannot touch the estate, and is precluded from all proceedings afterwards (b). There may, however, be cases of fraud or special contract or other peculiar circumstances which will deprive a mortgagee of his right to pursue all his remedies concurrently (c).

Sale by
mortgagee—
whether Court
will restrain.

The Court has no jurisdiction to restrain a mortgagee from selling under a power of sale, provided he keep within the terms of the power and no case of fraud be made out (d). But the mortgagee will be restrained from selling without satisfying any condition which by the mortgage deed is imposed upon the exercise of the power (e).

A mere offer unaccompanied by actual tender of the monies due is not sufficient to prevent a sale (f). So long as the

(a) *Schoole v. Sall*, 1 Sch. & Lef. 349.

176; *Lockhart v. Hardy*, 9 Beav. 349; *Willes v. Devett*, 1 De G. & S. 392.

(b) *Palmer v. Hendrie*, 27 Beav. p. 351; *Kinnaird v. Trollope*, 39 C. D. 636, 644.

(c) *Cockell v. Bacon*, 16 Beav. 158; *Palmer v. Hendrie*, 27 Beav.

(d) See *Jenkins v. Jones*, 2 Giff. 99; *Harding v. Pingey*, 10 Jur. N. S. 872; *Warner v. Jacob*, 20 C. D. 220.

(e) See *Gill v. Newton*, 14 W. R. 490; and see *Robbins*, 893.

(f) *Matthie v. Edwards*, 16 L. J. Ch. 405.

mortgagee is acting *bonâ fide*, he can only be stopped by tender of the principal monies due, interest and costs (g) : or, if an action is pending, by payment into Court of the amount which the mortgagee claims to be due to him (h). If, however, it appears upon the face of the mortgage deed that the mortgagee is claiming more than is due to him, the mortgagor will not be required to pay into Court the full amount claimed (i).

Chap. XVII.

Sect. 7 of the Bills of Sale Act, 1882, which prevents seizure of personal chattels under a bill of sale except for the causes therein mentioned, provides (*inter alia*) that the grantor may within five days from the seizure or taking possession of any chattels apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

Bills of Sale Act,
1882, s. 7.

A sale by a mortgagee under a power, even with stringent conditions, will not be stopped on light grounds (k). A mortgagee, however, may be restrained from completing a sale and so creating fresh rights, when a good equitable case is made out (l). Where a special authority to sell has been given to a person, and it is alleged that it has been revoked at law, an injunction will not be granted to restrain a sale unless the power has been revoked in equity. Thus in *Harcourt v. Ramsbottom* (m), an injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator was refused although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority.

If special circumstances, however, be made out, a mortgagee will be restrained by injunction from selling under his power of sale. Where, for example, the mortgagee of the property

(g) *Paynter v. Carew*, Kay, App. 36; *Hill v. Kirkwood*, 28 W. R. 359, W. N. (1880) 22. Comp. *Paine v. Edwards*, 8 Jur. N. S. 1200; *Jenkins v. Jones*, 2 Giff. 99.

(h) *Hickson v. Darlow*, 23 C. D. 690 (C. A.); *Hill v. Kirkwood*, ante.

(i) *Hickson v. Darlow*, 23 C. D. 690 (C. A.).

(k) *Kershaw v. Kalow*, 1 Jur. N. S. 974; *Macleod v. Jones*, 24 C. D. pp. 296, 299 (C. A.).

(l) *Boulter v. Mutual Loan, &c., Association*, W. N. (1869) 89.

(m) 1 J. & W. 505.

Chap. XVII.

of a company was also a shareholder in the company and had presented a petition for winding up the company, he was restrained from exercising his power of sale under the mortgage until the hearing of the petition (*n*).

The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee (*o*).

The mere institution of a redemption action does not affect the mortgagee's power of sale (*p*); nor, it is submitted, will the commencement of a foreclosure action by the mortgagee prevent his exercising the power of sale.

A mortgagee in exercising his power of sale, is not a trustee for the mortgagor (*q*), even where the mortgage is in the form of a trust for sale (*r*); and a sale by a mortgagee at an undervalue will not be set aside, unless the price is so inadequate as to be evidence of fraud (*s*). In fact the only obligation upon a mortgagee selling under his power of sale is that he should act in good faith. In determining whether the mortgagee's conduct in this respect comes up to the required standard, regard must be had to the circumstances of the particular case (*t*).

A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession

Injunctions
against
mortgagor on
application of
mortgagees.

(*n*) *Ex parte Fell*, 29 W. R. 881, 762; (1897) A. C. 180.

W. N. (1881) 125.

(*r*) *Warner v. Jacob*, 20 C. D. 220.

(*o*) *Macleod v. Jones*, 24 C. D. 289 (C. A.).

(*s*) *Warner v. Jacob*, 20 C. D. p. 224; and see *Kennedy v. De Trafford*, (1897) A. C. 180.

(*p*) *Adams v. Scott*, 7 W. R. 213.

(*q*) *Warner v. Jacob*, 20 C. D.

220; *Farrar v. Farrars, Limited*,

40 C. D. 395, 410, 411 (C. A.);

Kennedy v. De Trafford, (1896) 1 Ch.

(*t*) *Kennedy v. De Trafford*, (1897) A. C. 180, 185, 192; and see *Nutt v. Easton*, (1899) 1 Ch. 873; (1900) 1 Ch. 29.

under the mortgage may, provided that the mortgage includes the goodwill, obtain on interlocutory application an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises (u).

Where a mortgagee has appointed a receiver under the Conveyancing Act, 1881, the Court will restrain the mortgagor from distraining for rent due from a tenant of the property. This will be done even in a case where the receiver is negligent in collecting the rents (x).

A mortgagee with a power of sale is in the position of a trustee for the mortgagor and those claiming under him of the surplus monies that may remain after satisfaction of what is owing under the mortgage (y); and he may be ordered to pay interest on such surplus monies in his hands (z).

The trustee of a chapel belonging to a public body, being also a mortgagee of the chapel under an instrument executed for the purposes of the trusts, will not be restrained from exercising the rights of a mortgagee, although in opposition to the trusts (a).

When an advowson is the subject of a mortgage, the Court will, upon the tender of the mortgage monies by the mortgagor, restrain the mortgagee from presenting, though a bill for foreclosure has been instituted. The mortgagee does not till after foreclosure acquire a right to present (b).

A mortgagor of a ship remaining in possession retains under the Merchant Shipping Act, 1894 (c), all the rights and powers of ownership, and his contracts with regard to the ship will

(u) *Truman & Co. v. Redgrave*, 18 C. D. 547; *Whitley v. Challis*, (1892) 1 Ch. 64; and see *In re Leas Hotel Co.*, (1902) 1 Ch. 332.

(x) *Bayly v. Went*, W. N. (1884) 197; 51 L. T. 765; *Woolston v. Ross*, (1900) 1 Ch. 788.

(y) *Cholmondeley v. Clinton*, 4 Bligh, 1, *per* Lord Eldon; *Jenkins v. Jones*, 2 Giff. 108; *Warner v.*

Jacob, 20 C. D. 220.

(z) *Charles v. Jones*, 35 C. D. 544; *Eley v. Read*, 76 L. T. 39 (C. A.).

(a) *Att.-Gen. v. Hardy*, 1 Sim. N. S. 338.

(b) *Amhurst v. Dawling*, 2 Vern. 401. See *Gardiner v. Griffith*, 2 P. Wms. 403.

(c) 57 & 58 Vict. c. 60, s. 34.

Chap. XVII.

be valid and effectual, provided his dealings do not materially impair the security of the mortgage. The Court will restrain the mortgagee from interfering with the due execution of such contracts. When a mortgagor in possession had entered into a charter-party, the mortgagees were restrained at the suit of the charterers from dealing with the ship in derogation of the charter-party (*d*).

Injunctions at
suit of equitable
mortgagees.

The mortgagee of an equity of redemption may, on a proper case being made out, obtain an injunction to restrain the mortgagee or other person in possession of the legal estate from paying over to the mortgagor the surplus rents or monies which remain after the satisfaction of his own claim (*e*).

Under the old law a mortgagee having the legal estate could not, except under special circumstances, obtain a receiver, because he could take possession under his legal title (*f*). But since the Judicature Acts the Court may, in its discretion, appoint a receiver at the instance of a legal mortgagee (*g*). A mortgagee, however, who has once taken possession, cannot relinquish it at his pleasure. Having once assumed the responsibilities attaching to a mortgagee in possession, he cannot, at his own pleasure, get rid of them; and as a general rule the Court will not, by appointing a receiver, assist him to do so (*h*).

A receiver will not be appointed at the instance of a puisne mortgagee if a prior legal incumbrancer is in possession, unless the applicant will pay off the prior mortgagee's demand. If the prior incumbrancer be not in possession, a puisne mortgagee may obtain the appointment of a receiver, without prejudice to the right of the prior mortgagee to apply for possession (*i*).

An equitable mortgagee by deposit of deeds may obtain an injunction, or the appointment of a receiver, for protection of

(*d*) *Collins v. Lamport*, 4 D. J. & S. 500. p. 239.

(*e*) *Berney v. Sewell*, 1 J. & W. 647; *Parker v. Calcraft*, 6 Madd. 11; *Jenkins v. Jones*, 2 Giff. 99.

(*f*) *Berney v. Sewell*, 1 J. & W. 647; *Tillett v. Nixen*, 25 C. D.

(*g*) *Re Prytherch*, 42 C. D. 590.

(*h*) *Ib.*; but see *Tillett v. Nixen*, 25 C. D. 238.

(*i*) *Berney v. Sewell*, 1 J. & W. 647; *Brooks v. Greathead*, *ib.* 176; and see *Seton*, 759, 760.

his security (*k*). So also may a mortgagee by assignment of an equitable chose in action (*l*). So also may a man who is possessed of an equitable lien (*m*). The lien which a solicitor has on the papers of his client will be protected by injunction (*n*).

In an action by an equitable mortgagee for sale and foreclosure, an *interim* injunction was granted to restrain dealing with the legal estate till the next motion day on an *ex parte* application by the plaintiff, there being ground to believe that the defendant intended to part with the legal estate (*o*).

If a mortgagor agrees to mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration, and afterwards becomes possessed of property answering the description, a Court of Equity would compel him to perform the contract, and such contract would, in equity, transfer the beneficial interest to the mortgagee immediately on the property being acquired; provided that the contract is one of that class of which a Court of Equity would decree the specific performance (*p*).

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged premises without joining the mortgagee (*q*).

When a tenant for life proposed to mortgage settled lands under sect. 11 of the Settled Land Act, 1890, under such circumstances that the interests of certain annuitants would have been prejudiced thereby, the Court restrained him from carrying out the mortgage otherwise than subject to the rights of such annuitants (*r*).

(*k*) *Whitbread v. Jordan*, 1 Y. & C. Ex. 303; *Meux v. Bell*, 7 Jur. 821; *Bodger v. Bodger*, 11 W. R. 160. 346; *Richards v. Platel*, Cr. & Ph. 79; *Watson v. Lyon*, 7 D. M. & G. 288.

(*l*) *Levinger v. Crumby*, 21 W. R. 37. (*o*) *London and County Banking Co. v. Lewis*, 21 C. D. 490.

(*m*) *Holroyd v. Marshall*, 10 H. L. 191; *Middleton v. Magray*, 2 H. & M. 233; *Gurnell v. Gardner*, 4 Giff. 686. (*p*) *Holroyd v. Marshall*, 10 H. L. 211, *per* Lord Westbury.

As to vendor's lien in the case of land sold to a railway, see *ante*, p. 108. (*q*) *Fairclough v. Marshall*, 4 Ex. D. 37. See the Judicature Act, 1873, s. 25, sub.-s. (5).

(*n*) *Stedman v. Webb*, 4 M. & C. (*r*) *Hampden v. Buckinghamshire (Earl)*, (1893) 2 Ch. 531. 544 (C. A.).

Chap. XVII.

Stipulation by mortgagee for collateral advantage.

A mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided that the equity of redemption is not thereby fettered and the bargain is a fair and reasonable one, entered into without any improper pressure, unfair dealing, or undue influence (s). Accordingly, where a mortgage of an hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all malt liquors sold on the premises, and the mortgagors ceased to deal with the mortgagee, the mortgage being still subsisting, the Court granted an injunction at the instance of the mortgagee (t).

In reference to stipulations of this character, Lord Davey, in a recent case (u), said:—"The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan." Where, therefore, a mortgage of a leasehold public-house to brewers contained a covenant by the mortgagor that he and all persons deriving title under him would not, during the continuance of the term, and *whether any principal moneys, or interest should or should not be owing* under the mortgage, sell any malt liquors on the premises except such as should have been purchased of the mortgagees, it was held that such covenant could not be enforced after payment off of the mortgage money (x).

Where a mortgage contains a stipulation giving the mortgagee an option to purchase the mortgaged premises or part thereof, such a stipulation is invalid (y). It would be otherwise if the option was conferred by a separate and independent transaction entered into after the date of the mortgage (z).

(s) *Biggs v. Hoddinott*, (1898) 2 Ch. 307 (C. A.).

(t) *Ib.*

(u) *Noakes & Co., Ltd. v. Rice*, (1902) A. C. p. 34.

(x) *Noakes & Co., Ltd. v. Rice*, (1900) 1 Ch. 213; (1900) 2 Ch. 445; (1902) A. C. 24. *Quære*,

whether this case does not in effect overrule the decision of the Court of Appeal in *Santley v. Wilde*, (1899) 1 Ch. 747; (1899) 2 Ch. 474.

(y) *Jarrah Timber Corporation v. Samuel*, (1902) 2 Ch. 479.

(z) *Lisle v. Reeve*, (1902) 1 Ch. 53; (1902) A. C. 461.

CHAPTER XVIII.

INJUNCTIONS AGAINST COMPANIES.

THE Court will, on a proper case being made out, restrain companies, whether incorporated by Statute or constituted under deeds of settlement, from doing illegal acts, or violating the duties which attach to the relation of shareholders and directors, *inter se*. Chap. XVIII.

The principles on which the Court interferes in restraining a company from doing illegal acts are the same as those on which it interferes in other cases. If the right at law is clear, and the breach is clear, and serious injury is likely to arise from the breach, the Court will interfere at once and protect the right by injunction. But if the right at law is not clear or the breach is doubtful, the Court, in determining whether or not it shall interfere by injunction, is guided by the balance of convenience and inconvenience likely to arise to the parties from granting or withholding the injunction (*a*).

Companies incorporated by Statute are bound to confine themselves within the limits of the powers which have been conferred upon them by the legislature, and to proceed in the mode which the legislature has pointed out. If a company goes beyond the line of its authority, and violates the rights of others, it becomes amenable to the jurisdiction of the Court by injunction (*b*).

Companies incorporated for a special purpose exist for those purposes only for which they have been incorporated, and for no other purpose whatever (*c*). Acts illegal
as against
the public. The agency of the company,

(*a*) *Fielden v. Lancashire and Yorkshire Railway Co.*, 2 De G. & S. 531; *Norman v. Mitchell*, 5 D. M. & G. 673; *ante*, pp. 20, 21. *Waterworks Co.*, 2 D. M. & G. 860; *ante*, pp. 85, 126.

(*c*) *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *National Manure Co. v. Donald*, 4 H. & N. 8.

(*b*) *Frewin v. Lewis*, 4 M. & C. 254; *Mayor of Liverpool v. Chorley*

Chap. XVIII. the course of action, and the sphere of action of the company, are limited entirely to that which is defined by the legislature. What it is empowered to do it has a right to do, and what it is not empowered to do it must be considered as having no right to do (*d*). Those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not literally be within it, would not be prohibited (*e*). The Court will restrain a company, which has been incorporated for a special purpose, from going beyond or exceeding the scope of such purpose. Thus, a railway company was restrained from carrying on the business of coal merchants (*f*), or the business of a shipping company or of brewers (*g*), or from purchasing shares in another company (*h*). A company formed to make and deal in railway carriages cannot purchase a concession for making a foreign railway (*i*); and on the same principle a company formed solely for the purpose of carrying on the business of life insurance was restrained from carrying on the business of marine insurance (*k*).

"It is," said Lord Hatherley, "a principle of public policy that where Parliament has authorised a company to raise a large capital for a specific purpose, the privilege confers no right upon the company to employ their capital in competition with the general public upon speculations of a different kind" (*l*).

Proceedings to restrain a railway company or other public body from exceeding its powers should be instituted by the Attorney-General. A rival company is not qualified to represent the rights and interests of the public (*m*). But a private

Acts illegal
as against
the public.

(*d*) *Stockport District Waterworks Co. v. Mayor, &c., of Manchester*, 9 Jur. N. S. 266.

(*e*) *Att.-Gen. v. Great Eastern Railway Co.*, 5 A. C. 481, *per* Lord Blackburn; *London and North Western Railway Co. v. Price*, 11 Q. B. D. 485, 489; *Stagg v. Medway (Upper) Navigation Co.*, (1903) 1 Ch. 169 (C.A.).

(*f*) *Att.-Gen. v. Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(*g*) *Lyde v. Eastern Bengal Railway Co.*, 36 Beav. 10.

(*h*) *Great Western Railway Co. v. Metropolitan Railway Co.*, 32 L. J. Ch. 382.

(*i*) *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653.

(*k*) *Phoenix Life Assurance Co.*, 2 J. & H. 441.

(*l*) *Hare v. London and North Western Railway Co.*, 2 J. & H. 109; and see *Att.-Gen. v. Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(*m*) *Stockport Waterworks Co. v. Mayor, &c., of Manchester*, 9 Jur.

individual may sue if he can show special damage (*n*). To support an information, no substantial damage or definite injury to the public need be shown. It is enough that the company has not strictly followed, or is about to transgress the powers which have been vested in it by the legislature (*o*), or is doing an act which is illegal and tends to the injury of the public (*p*); but the Court will not, as a rule, upon an information, entertain jurisdiction, unless it is clear that the interest of the public calls for its interference (*q*). It was said by James, L.J., in *Att.-Gen. v. Great Eastern Railway Co.* (*r*), That it is not enough that the act complained of may be *ultra vires*, and that it interests the public; but that it is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance that the Attorney-General ought to interfere (*r*). This does not seem consistent, however, with more recent authorities (*rr*).

In a recent case in which a railway company having constantly allowed their trains to pass over a level crossing at a speed exceeding four miles an hour, in disregard of the provisions of sect. 48 of the Railways Clauses Act, 1845, an information was filed by the Attorney-General to restrain them from so doing. The railway company set up as a defence that there was no proof of any injury occasioned to the public, and that the inconvenience to the public by reason of the existence of the level crossing would be increased if they complied with the requirements of sect. 48 of the Railways Clauses Act; but it was held that as the information

N. S. 266; *Pudsey Gas Co. v. Bradford*, 15 Eq. 170; *Att.-Gen. v. London and North Western Railway Co.*, (1900) 1 Q. B. 78 (C. A.).

(*n*) See *post*, p. 473.

(*o*) *Mayor of Liverpool v. Chorley Waterworks Co.*, 2 D. M. & G. 860; *Ware v. Regent's Canal Co.*, 3 D. & J. 228; *Att.-Gen. v. Cockermouth Local Board*, 11 Eq. 172; *Bonner v. Great Western Railway Co.*, 24 C. D. 8, *per* Baggallay, L. J.; *Jordeson*

v. Sutton, (1899) 2 Ch. 217; *Att.-Gen. v. London and North Western Railway Co.*, (1900) 1 Q. B. 78 (C. A.).

(*p*) *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 C. D. 752.

(*q*) *Att.-Gen. v. Birmingham, &c., Derby Railway Co.*, 2 Ra. Ca. 125; *Att.-Gen. v. Birmingham and Oxford Railway Co.*, 3 Mac. & G. 461.

(*r*) 11 C. D. p. 484.

(*rr*) See *infra*.

Chap. XVIII.

was filed by the Attorney-General to enforce the express terms of an enactment made by the legislature in the interests of the public, the Court could not entertain the question whether injury to the public was in fact occasioned by the contravention of the Act, but was bound to grant the injunction (s).

If a railway company, authorised by special Act to construct a main line with a branch, complete the one and take no steps to complete the other, the remedy is by *mandamus*, and not by injunction (t).

A railway company has been restrained from opening their line without the sanction of the Board of Trade (u): and where an inspector of the Board of Trade reports, in accordance with 5 & 6 Vict. c. 55, s. 6, that the opening of a railway, or branch of a railway, will be attended with danger to the public by reason of the incompleteness of the works, the Board of Trade has exclusive jurisdiction in the matter, and the Court will not enter into the question as to whether the inspector has come to a wrong conclusion (x).

The Court of Chancery would not restrain a railway company from making certain charges (y), or from charging the plaintiff for the carriage of his goods otherwise than equally with other persons (z). But by the Railway Traffic and Canal Act, 1854, 17 & 18 Vict. c. 31, ss. 2, 3, power was given to the Court of Common Pleas to grant an injunction against railway and canal companies, who, by their traffic arrangements, give an undue or unreasonable preference to, or advantage to, or in favour of any particular person or company in any particular description of traffic, in any respect whatever (a). This jurisdiction was

(s) *Att.-Gen. v. London and North Western Railway Co.*, (1899) 1 Q. B. 72; (1900) 1 Q. B. 78.

(t) *Att.-Gen. v. Birmingham and Oxford Railway Co.*, 4 De G. & S. 490.

(u) *Att.-Gen. v. Great Western Railway Co.*, 7 Ch. 767. See, as to sanction of Board of Trade, *Pearce v. Wycombe Railway Co.*, 1 Drew. 244; *Att.-Gen. v. Great Northern Railway Co.*, 1 Dr. & Sm. 154.

(x) *Att.-Gen. v. Great Western Railway Co.*, 4 C. D. 735 (C. A.).

(y) *Pickford v. Grand Junction Railway Co.*, 3 Ra. Ca. 538, 558.

(z) *Sutton v. South Eastern Railway Co.*, L. R. 1 Ex. 32.

(a) See *Palmer v. London and South Western Railway Co.*, L. R. 1 C. P. 588, as to the principles on which the jurisdiction under the Act will be exercised.

transferred to the Railway Commissioners by the Regulation of Railways Act, 1873 (*b*) ; and has since become vested in the Railway and Canal Commissioners by 51 & 52 Vict. c. 25, s. 8. Accordingly if a railway company carries goods for a customer at a lower rate than that charged to other customers, it may be an undue preference and give the other customers a right to complain before the Railway Commissioners, but it is not an act *ultra vires*, and gives no right to a shareholder to sue for an injunction (*bb*).

In a case in which a contract which was *ultra vires* had been entered into by a railway company with A, and A afterwards obtained judgment by consent enforcing the contract, it was held, in subsequent proceedings, that the contract was invalid, and that the judgment having been obtained by consent without the question of *ultra vires* being raised, was of no greater validity, and relief was accordingly granted upon that footing (*c*).

With regard to the jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators, Lord Halsbury, in a recent case (*d*), said: "One question has been raised which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction ; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment ; but what right has a Court of law to intervene ? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General,

Attorney-General's discretion as to suing on behalf of relators.

(*b*) 36 & 37 Vict. c. 48, s. 6.

Railway Co. v. Charlebois, (1899)

(*bb*) *Anderson v. Midland Railway Co.*, (1902) 1 Ch. 369.

A. C. 114.

(*d*) *London County Council v.*

(*c*) *Great North - West Central*

Att.-Gen., (1902) A. C. p. 168.

Chap. XVIII.

Acts illegal as
against private
persons.

and not for the Courts, to determine whether he ought to initiate litigation in that respect or not."

A private person who applies for an injunction to restrain a company from violating the provisions of an Act of Parliament, must be able to satisfy the Court that he will suffer substantial injury from the Act complained of (*e*). As a general principle, where the Statute prohibits the doing of a particular act, affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the King's subjects, by an infringement of the law. But when the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage (*f*).

A creditor cannot, upon the ground that a company is diminishing its fund for the payment of debts, maintain an action to restrain the company from dealing with its assets (otherwise than assets, if any, comprised in the creditor's security) in such manner as the company thinks fit (*g*).

User of land
acquired by a
company under
statutory powers.

A railway or other company having acquired land under their statutory powers for the purposes of their undertaking have generally a right to use the land which they have acquired, as they think fit, provided they are not using it in a manner which is inconsistent with the proper purposes of the Act under which they are incorporated (*h*). If they have been empowered to take land on the banks of a river, they have all the ordinary rights of riparian proprietors (*i*). So also they have a right

(*e*) *Holyoake v. Shrewsbury and Birmingham Railway Co.*, 5 Ra. Ca. 421; *Mayor of Liverpool v. Chorley Waterworks Co.*, 2 D. M. & G. 860; *Pulsey Gas Co. v. Corporation of Bradford*, 15 Eq. 170.

(*f*) 1 Exch. 877, per Lord Wensleydale.

(*g*) *Mills v. Buenos Ayres Co.*, 5

Ch. 621, 628.

(*h*) *Bonner v. Great Western Railway Co.*, 24 C. D. 10; *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711.

(*i*) *Swindon Waterworks Co. v. Wilts & Berks Canal Co.*, L. R. 7 H. L. 697.

to take measures to prevent prescriptive rights being acquired for windows looking over their land (*k*). Chap. XVIII.

But a company incorporated by Act of Parliament and acquiring land under statutory powers for the purposes of their undertaking have not in all respects the same rights over the land as an ordinary purchaser of the land in fee. The company is entitled to use the land for all the purposes of the undertaking whatever they may be, but beyond that they have not the rights of an ordinary purchaser in fee simple. They can neither use it themselves nor give any one else the right to use it for any purposes except the necessary purposes of the undertaking (*l*). If a company incorporated by Act of Parliament for a particular purpose and acquiring land under statutory powers for the purposes of their undertaking is using the land so acquired in any other way than for the proper purposes of the undertaking (*m*), or is constructing works or buildings on the land which it is not authorised to construct, and such improper and unauthorised use of the land interferes with the rights of an individual, that individual may come to the Court to restrain the company from such unlawful user of the land (*n*).

Recent cases, however, appear to qualify the rule stated above as to the powers of companies incorporated by Act of Parliament to use their property. Thus where a railway company acquired in fee simple under their compulsory powers, a strip of land on which they constructed a railway

(*k*) *Bonner v. Great Western Railway Co.*, 24 C. D. 10; *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711 (C. A.).

(*l*) *Mulliner v. Midland Railway Co.*, 11 C. D. 622; *Ayr Harbour Trustees v. Oswald*, 8 A. C. 634, per Lord Blackburn; *Bird v. Eggleton*, 29 C. D. 1017; but see *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711 (C. A.); *Gonty v. Manchester, Sheffield and Lincolnshire Railway Co.*, (1896) 2 Q. B. 439 (C. A.).

(*m*) *Bostock v. North Staffordshire Railway Co.*, 4 E. & B. 798; 5 De G. & Sm. 584; *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711, 719.

(*n*) *Bonner v. Great Western Railway Co.*, 24 C. D. 10, per Baggallay, L. J.; *Bayley v. Great Western Railway Co.*, 26 C. D. 455. See *Warden of Dover Harbour v. South Eastern Railway Co.*, 9 Ha. 489; *Atley v. Sheffield and Lincolnshire Railway Co.*, 2 D. & J. 463.

Chap. XVIII.

carried over a series of arches, and afterwards let the interiors of the arches for shops to divers persons upon short tenancies, reserving power to resume possession when they deemed it necessary for the purposes of the railway, it was held that such a letting of the arches was not inconsistent with the purposes for which the company was constituted, and was therefore within the company's powers (*o*). So, again, although a railway company cannot alienate any land which is required for the purposes of its undertaking (*p*), nor grant any easement which is inconsistent with such purposes (*q*), it can grant a right of way or other easement over its lands where it is not inconsistent with the purposes for which the lands were taken (*r*).

So, also, where land was acquired and used by a canal company under their statutes for the purposes of a towing path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing path by the company, it was held that the company could dedicate the land as a public footpath, subject to its use by them as a towing path (*s*).

Temporary
use of land
acquired for
undertaking.

A railway company may use the land, which they have acquired under the Lands Clauses Act, in the same state and condition, without making any alteration by building or otherwise which would interfere with the rights of their neighbours, until the time arrives when they must either sell it or satisfy the Court that they are keeping it for the purposes of their undertaking. Until the time arrives when they must apply the land which they have taken to the purposes of the undertaking they have a perfect right to use it in the same state in which

(*o*) *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711 (C. A.); and see

Gonty v. Manchester, Sheffield and Lincolnshire Railway Co., (1896) 2 Q. B. 439 (C. A.).

(*p*) *Hobbs v. Midland Railway Co.*, 20 C. D. 418.

(*q*) *Mulliner v. Midland Railway Co.*, 11 C. D. 622; cf. *Grand Junction Canal Co. v. Petty*, 21 Q. B. D.

273.

(*r*) *Gonty v. Manchester, Sheffield and Lincolnshire Railway Co.*, (1896) 2 Q. B. 439 (C. A.); and see *Foster v. London, Chatham and Dover Railway Co.*, (1895) 1 Q. B. 711 (C. A.); *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273 (C. A.).

(*s*) *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273 (C. A.).

it was when conveyed to them, not to alienate it or to do an act which will prevent them from ever using it for the purposes of their railway, but using it by way of *interim* user till the time arrives when they are to apply it to the purposes of their undertaking. The fact of a stable having been purchased by a railway company for the purposes of their undertaking does not preclude them from claiming a right of way to it so long as they used the premises as a stable, which they may lawfully do, till such time as the premises are required for the special purposes of the railway or are sold as superfluous land (t).

Chap. XVIII.

A railway company selling its superfluous lands may sell them in the way that is most advantageous to itself and under such conditions and restrictions as to the mode of user as may be most to their advantage as vendors. In that respect they have the same rights as ordinary vendors (u).

Sale of
superfluous land.

The acts of a company may be illegal as against an individual member of the company, and where such is the case, a shareholder of the company may sue the company to restrain an individual injury to himself (x). The Court will upon a proper case being made out, interfere by injunction in aid of the legal right. Injunctions have accordingly been granted to restrain the illegal or oppressive forfeiture of shares (y), the insertion and continuance of a man's name on the register of shareholders (z); the interference by the company with a shareholder or debenture-holder in the exercise of his statutory right to inspect at all reasonable times the register of mortgages of the company (b). So, also, an injunction has been

Acts illegal
as against
individual
members.

(t) *Bayley v. Great Western Railway Co.*, 26 C. D. 455 (C. A.).

(u) *Re Higgins and Hitchman*, 21 C. D. 98; *cf. Bird v. Eggleton*, 29 C. D. 1012.

(x) *Pulbrook v. Richmond Mining Co.*, 9 C. D. 610; *Munster v. Cammell Co.*, 21 C. D. 183.

(y) *Norman v. Mitchell*, 5 D. M. & G. 648; *Johnson v. Lytle's Iron Agency Co.*, 5 C. D. 687; *Goulton v. London Architectural, &c., Co.*, (1877)

W. N. 141.

(z) *Taylor v. Hughes*, 2 J. & L. 24; *Bargate v. Shortridge*, 5 H. L. C. 297. The procedure in the case of companies governed by the Companies Act, 1862, is usually by motion to rectify the register under s. 35.

(b) See sects. 45 and 63 of the Companies Clauses Act, 1845, sect. 28 of the Companies Clauses Act, 1863, and sect. 43 of the Companies Act,

Chap. XVIII.

Rights of
members of a
company *inter se*.

A single share-
holder suing on
behalf of himself
and all others
has a right to
an injunction.

granted upon the application of a director restraining the plaintiff's co-directors from wrongfully excluding him from acting as director (*f*).

Companies formed for a special purpose, and whether constituted under deed of settlement or incorporated by Act of Parliament, by charter, letters patent or registration, are looked upon as analogous to a partnership, and the members of the company in their individual capacity are considered to have rights *inter se*, analogous to those of partners (*g*). Any single registered shareholder has a right to bring an action either in his own name (*h*), or on behalf of himself and all other shareholders who have a common interest with himself to restrain the application of the common funds of the company to another purpose than the proper purposes of the concern, and the Court will interpose on his behalf by injunction (*i*). The amount of interest of the complaining shareholder will not be taken into consideration (*k*). Nor will his motives for complaining be inquired into (*l*).

A holder of scrip certificates may maintain the action (*m*). So also a shareholder of an old company which has been incorporated with a new company may sue in respect of the funds of the new company, although he has not complied with all the formalities required to make him a shareholder of such

1862; and see *Holland v. Dickson*, 37 C. D. 669; *Mutter v. South Eastern Railway Co.*, 38 C. D. 92 (C. A.); and *Nelson v. Anglo-American Land Co.*, (1897) 1 Ch. 130. As to the right of inspecting the register of members of a company under sect. 32 of the Companies Act, 1862, see *Balaghat Gold Mining Co.*, (1901) 2 K. B. 665 (C. A.). Such right of inspection ceases upon the company going into liquidation: *In re Kent Coalfields Syndicate, Ltd.*, (1898) 1 Q. B. 764 (C. A.).

(*f*) *Pulbrook v. Richmond Mining Co.*, 9 C. D. 610; *Kyshe v. Alturas Co.*, 4 T. L. R. 331; but see *Bainbridge v. Smith*, 41 C. D. 462.

(*g*) *Simpson v. Denison*, 10 Ha. 51.

(*h*) *Hoole v. Great Western Railway Co.*, 3 Ch. 262.

(*i*) *Macbride v. Lindsay*, 9 Ha. 585; *Carlisle v. South Eastern Railway Co.*, 1 Mac. & G. 699; *Fawcett v. Laurie*, 1 Dr. & Sm. 192, 202; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 717; and see *Marshall v. S. Staffs Tramways Co.*, (1895) 2 Ch. 36 (C. A.).

(*k*) *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578.

(*l*) *Bloxam v. Metropolitan Railway Co.*, 3 Ch. 353.

(*m*) *Bagshawe v. Eastern Union Railway Co.*, 2 Mac. & G. 389.

new company (*n*). A railway company which has taken shares in another railway company (*o*), or is the equitable owner of shares in another railway company, may also maintain the suit, the trustees in whom the shares are vested being made in the latter case defendants (*p*). Chap. XVIII.

A shareholder may maintain the suit, although holding shares in a rival company (*q*); provided the suit is a *bonâ fide* one, instituted honestly and really for the benefit and common interest of the shareholders whom he claims to represent (*r*). The fact that the suit may not have been instituted from the best of motives is not sufficient to debar him from suing. If, however, a plaintiff purports to sue on behalf of himself and the other shareholders of a company, and it appears that he is the mere puppet and nominee of a rival company, relief will not be given (*s*); but it is otherwise if he purport to sue on behalf of himself personally, and not on behalf of the other shareholders, although he may be a mere puppet of a rival company (*t*).

A shareholder cannot, however, institute a suit on behalf of himself and all other shareholders unless for a purpose in which his interest is identical in a judicial point of view with that of those whom he professes to represent (*u*). If he has a distinct and separate interest from that of the rest of the shareholders,

The interest of the plaintiff must be identical with that of those whom he professes to represent.

(*n*) *Spackman v. Lattimore*, 3 Giff. 16; but, *quere*, whether a person having a right to be registered as a member can before registration commence such an action; see *Mills v. Buenos Ayres Railway Co.*, 5 Ch. 621.

(*o*) *Great Western Railway Co. v. Oxford, Worcester, and Wolverhampton Railway Co.*, 3 D. M. & G. 341.

(*p*) *Great Western Railway Co. v. Rushout*, 5 De G. & S. 306.

(*q*) *Salomons v. Laing*, 12 Beav. 353; *Winch v. Birkenhead, Lancashire, &c., Railway Co.*, 5 De G. & S. 581; *Att.-Gen. v. Great Northern Railway Co.*, 1 Dr. & Sm. 159.

(*r*) *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 4 D.

F. & J. 130. See *Fraser v. Whalley*, 2 H. & M. 10.

(*s*) *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 4 D. F. & J. 130; *Filder v. London, Brighton, &c., Railway Co.*, 1 H. & M. 489. See *Bloxam v. Metropolitan Railway Co.*, 3 Ch. 353; *Robson v. Dodds*, 8 Eq. 305; but see *Mutter v. Eastern and Midland Railway Co.*, 38 C. D. 92, 96.

(*t*) *Mutter v. Eastern and Midlands Railway Co.*, 38 C. D. 92, 104 (C. A.).

(*u*) *Mozley v. Alston*, 1 Ph. 790; *Clay v. Rufford*, 8 Ha. 281; *Williams v. Salmon*, 2 K. & J. 463. See *Doyle v. Muntz*, 5 Ha. 509.

Chap. XVIII.

he cannot sue on behalf of himself and them (*x*). Thus, although the Court may in a suit so framed restrain the directors of a company from declaring a future dividend, it cannot upon an application in this form restrain the payment of a dividend already declared, because, as soon as a dividend has been declared, each shareholder acquires a separate right to his share of the dividend (*y*). A man who by his conduct has personally precluded himself from suing cannot maintain the suit (*z*); nor should a suit be instituted by a shareholder on behalf of himself and all other shareholders, complaining of transactions in which some of them have acquiesced (*a*).

Defendants
to suit.

The directors should, it seems, be made parties to an action to restrain the doing of an unlawful act by the company (*b*). Shareholders who have an interest distinct and opposed to other shareholders should be made parties, but if one shareholder complains of an act of the whole company or the executive of the company, there is no necessity for any other shareholders being represented (*c*). If the object of the action is to restrain the carrying out of an agreement with other companies, all the companies are necessary parties (*d*).

Acquiescence.

An act *ultra vires* of the company is incapable of ratification, and therefore cannot be made valid by the acquiescence of the shareholders (*e*). But acts *intra vires* as regards the company, although *ultra vires* the directors, may be rendered valid by acquiescence (*f*). Such acquiescence may be inferred from

(*x*) *Macbride v. Lindsay*, 9 Ha. 574; *Pullbrook v. Richmond Mining Co.*, 9 C. D. 610, 613.

(*y*) *Carlisle v. South Eastern Railway Co.*, 1 Mac. & G. 689; *Fawcett v. Laurie*, 1 Dr. & Sm. 199.

(*z*) *Burt v. British Nation Life Assurance Association*, 4 D. & J. 158.

(*a*) *Kent v. Jackson*, 14 Beav. 367; 2 D. M. & G. 49; *Stupart v. Arrow-smith*, 3 Sm. & G. 176; but see *White v. Carmarthen, &c., Railway Co.*, 1 H. & M. 786.

(*b*) *Ferguson v. Wilson*, 2 Ch. p. 90.

(*c*) *Hoole v. Great Western Railway Co.*, 3 Ch. 262.

(*d*) *Hare v. London and North Western Railway Co.*, 1 J. & H. 253. See 2 J. & H. 80; *Mauvell v. Midland Great Western Railway Co. of Ireland*, 1 H. & M. 130.

(*e*) *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Wenlock v. River Dee Co.*, 36 C. D. 674; 38 C. D. 534.

(*f*) *Houldsworth v. Evans*, L. R. 3 H. L. 263; *Spackman v. Evans*, L. R. 3 H. L. 190, 191.

circumstances which satisfy the Court that the thing to be Chap. XVIII.
 ratified came to the knowledge of all who chose to inquire, and that all the shareholders had full opportunity and means of inquiry (*g*). If the means of knowledge to all appear sufficient so as to raise the presumption of knowledge and acquiescence, and the arrangement is left unimpeached for a great number of years, then that which was in its inception invalid will by acquiescence be rendered unimpeachable (*h*). But full knowledge must be shown (*i*); it is not enough to show merely that there was sufficient to arouse attention (*k*). In the absence of full information mere lapse of time cannot grow into acquiescence. Length of time may, in many cases, materially assist in establishing acquiescence; but it is not the time, but the acquiescence, which changes what would otherwise be a void act into a valid one (*l*).

Where it is sought to establish an invalid transaction as having been rendered valid by acquiescence, it must be shown to come strictly within the terms of the arrangement which was communicated to and acquiesced in by the shareholders (*m*).

The question whether a company can be precluded by acquiescence from obtaining relief in respect of a misapplication of its funds which neither the directors nor the company could authorise or rectify, does not appear to have been decided (*n*).

In interfering by injunction at the suit of a shareholder suing on behalf of himself and all other members of the company to restrain a company, formed for a special purpose, from doing acts or entering into engagements, which are not within the proper purposes for which it was established, the Court not only enforces the equitable relations which subsist between

Injunction
at suit of
shareholder on
behalf of himself
and all others.

(*g*) *Phosphate of Lime Co. v. Green*,
L. R. 7 C. P. 43.

burn Society v. Brooks, 29 C. D. 902,
910.

(*h*) *Evans v. Smallcombe*, L. R. 3
H. L. 249; *Houldsworth v. Evans*,
L. R. 3 H. L. 263.

(*l*) L. R. 3 H. L. 260, *per* Lord
Chelmsford.

(*i*) *Ashbury v. Watson*, 28 C. D.
56, 30 C. D. 376.

(*m*) *Houldsworth v. Evans*, L. R.
3 H. L. 263.

(*k*) L. R. 7 H. L. p. 681; *Black-*

(*n*) *In re Sharpe*, (1892) 1 Ch.
p. 168.

Chap. XVIII. the members *inter se*, but acts in aid of the legal right. The suit by a shareholder to restrain a company from doing illegal acts or entering into engagements which are beyond the proper purposes of the company, may be in form on behalf of all the shareholders. It is immaterial that some of the shareholders may be opposed to the suit (o).

Injunctions have been granted at the suit of a shareholder suing on behalf of himself and all other shareholders to restrain a railway company from applying the funds of the company towards the establishment of a steam packet company in connection with the railway (p); or in the purchase of shares in another railway company (q). So also railway companies have been restrained from applying monies raised for the purpose of completing a particular branch, to the purposes of any part of the main line (r), and from applying the corporate funds in the construction of part only of the line or otherwise, than with the view and purpose of completing the whole (s). Where, however, in a somewhat similar case, it appeared that greater mischief would arise from granting than withholding the injunction, the Court refused to interfere (t).

Injunction
to restrain
improper
application of
company's funds

A company may not apply its funds in paying dividends out of capital (u); or in making a return of capital to shareholders, except in accordance with the provisions of the Companies Acts (x); or in paying unauthorised remuneration (y); or in

(o) *Beman v. Rufford*, 1 Sim. N. S. 550, 564; *White v. Carmarthen, &c., Railway Co.*, 1 H. & M. 786.

(p) *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1. Comp. *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 30 Beav. 40, *affd.* on other grounds, 4 D. F. & J. 126; *South Wales Railway Co. v. Redmond*, 10 C. B. N. S. 675.

(q) *Salomons v. Laing*, 12 Beav. 339.

(r) *Bagshaw v. Eastern Union Railway Co.*, 2 Mac. & G. 389. See 6 H. L. C. 137.

(s) *Cohen v. Wilkinson*, 12 Beav. 134, 1 Mac. & G. 486.

(t) *Hodgson v. Earl of Powis*, 1 D. M. & G. 14.

(u) *Lee v. Neuchatel Asphalte Co.*, 41 C. D. 1 (C. A.); *Macdougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; *Davison v. Gillies*, 16 C. D. 347, n.; *Foster v. New Trinidad, &c., Co.*, (1901) 1 Ch. 208; and see Table A to the Companies Act, 1862, art. 73. And see *Bond v. Barrow Hematite Co.*, (1902) 1 Ch. 353, where the question is discussed.

(x) *Moxham v. Grant*, (1900) 1 Q. B. 88 (C. A.).

(y) *Re Liverpool Stores Association*, 59 L. J. Ch. 618.

the payment of underwriting commission without complying with the requirements of sect. 8, sub-sect. 1, of the Companies Act; 1900 (z), or in making presents to the directors, or in discounting their bills (a); or in bribing a landowner to buy off his opposition in Parliament (b); or in the purchase of the shares of a retiring shareholder (c); or in the prosecution of an action in which the company are not plaintiffs (d); or in payment of the costs of a prosecution for libel against a former secretary of the committee of the company (e); or in payment of the costs of an unsuccessful petition for winding-up the company presented by the directors, but opposed by a number of the shareholders and a minority of the directors, and of the costs of an appeal from the dismissal of such petition (f); or generally in a way not provided for by the Act which regulates the business of the company (g). Chap. XVIII.

A limited company governed by the Companies Act, 1862, cannot purchase its own shares, as such a transaction amounts to an unauthorised reduction of capital (h). Upon the same principle, a surrender to a limited company by shareholders of partly paid shares in the company is, in effect, a transaction of purchase and sale, the company purchasing the shares in

(z) *Booth v. New Afrikander Gold Mining Co.*, (1903) 1 Ch. 295 (C. A.).

(a) *York and North Midland Railway Co. v. Hudson*, 16 Beav. 485; *Black v. Mallaluc*, 27 Beav. 404; *In re George Newman & Co.*, (1895) 1 Ch. 674 (C. A.).

(b) *Scottish North Eastern Railway Co. v. Stewart*, 3 Macq. 382, per Lord Cranworth.

(c) *Hodgkinson v. National Live Stock Insurance Co.*, 4 D. & J. 423; *Hope v. International Finance Society*, 4 C. D. 327.

(d) *Kernaghan v. Williams*, 6 Eq. 228.

(e) *Pickering v. Stephenson*, 14 Eq. 341. The costs of the prosecution of an action for libel carried on in the interests of the company are

properly payable out of the funds of the company. *Studdert v. Grosvenor*, 33 C. D. 528; cf. *Breay v. Royal British Nurses Association*, (1897) 2 Ch. 272 (C. A.).

(f) *Smith v. Duke of Manchester*, 24 C. D. 611.

(g) *Re St. George's Steam Packet Co.*, 21 L. J. Ch. 593; *Ex parte Cropper*, 1 D. M. & G. 147; *Salisbury v. Metropolitan Railway Co.*, 38 L. J. Ch. 249; *Tompkinson v. South Eastern Railway Co.*, 35 C. D. 675. See *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Bloxam v. Metropolitan Railway Co.*, 3 Ch. 337.

(h) *Trevor v. Whitworth*, 12 A. C. 409. As to the power of an unlimited company to return capital to its shareholders, see *Borough Commercial Society*, (1893) 2 Ch. 242.

Chap. XVIII.

consideration of discharging the shareholders from liability to calls; and such a transaction is therefore invalid (i). In like manner a limited company governed by the Companies Act, 1862, cannot issue its shares at a discount (k). But it is otherwise in the case of a company governed by the Companies Clauses Acts (kk).

Injunction at instance of preference shareholder.

The payment of dividends on the ordinary stock of a company until the arrears of dividend on preference shares, created under the provisions of an Act of Parliament, shall have been successively paid according to their priorities (l) out of the profits accruing subsequently to the date of the arrears (m), is improper, and will be restrained by injunction (n). The fact that the owner of preference shares may have in former years acquiesced in a declaration of a dividend on the ordinary shares, whilst there was an arrear of dividend due on the preference shares, will not deprive him of his right in respect of subsequent arrears, though it will preclude him from making any claim in respect of these particular arrears (o). A preferential shareholder may bring an action to restrain a company from declaring or paying a dividend prejudicial to his rights and interests (p).

Expenses of bill in Parliament.

The application of the funds of a company in paying the expenses of a bill in Parliament is improper, unless specially authorised by the Act or any Acts incorporated therewith (q). "The intended application," said Turner, L.J., in *Simpson v.*

(i) *Bellerby v. Rowland, &c., Co.*, (1901) 2 Ch. 265; (1902) 2 Ch. 14 (C. A.).

(k) *In re Almada and Tiritó Co.*, 38 C. D. 415 (C. A.); *Welton v. Saffery*, (1897) A. C. 299. See, however, the Companies Act, 1900, s. 8.

(kk) *Webb v. Shropshire, &c., Railway Co.*, (1893) 3 Ch. 307 (C. A.); *Statham v. Brighton Marine Palace Co.*, (1899) 1 Ch. 199.

(l) *Crawford v. North Eastern Railway Co.*, 3 K. & J. 733.

(m) *Stevens v. South Devon Railway Co.*, 9 Ha. 325; *Henry v. Great Northern Railway Co.*, 1 D. & J.

607. As to when preference shares entitle the holders thereof to cumulative preferential dividends, see *Staples v. Eastman Photographic Co.*, (1896) 2 Ch. 303 (C. A.).

(n) As to the manner in which profits are to be ascertained for the purpose of making a dividend, see *Foster v. New Trinidad, &c., Co.*, (1901) 1 Ch. 208; *Bond v. Barrow Haematite Steel Co.*, (1902) 1 Ch. 333.

(o) *Matthews v. Great Northern Railway Co.*, 28 L. J. Ch. 373.

(p) *Sturge v. Eastern Union Railway Co.*, 7 D. M. & G. 158.

(q) See 8 & 9 Vict. c. 16.

Denison (r), "is for another and a different purpose from that which is described in the Act under which the company is formed, and which constitutes the partnership deed of the company" (s). Accordingly railway companies have been restrained from applying any part of their funds towards the expenses incident to an application to Parliament for the promotion of a branch line (t), or a new line in extension of the existing one (u), for the improvement of the navigation of a river communicating by means of a branch line with the main line (x), or for the purpose of bringing about an alteration in the constitution of the company (y), or for the purpose of carrying out an arrangement with another company (z), or for the purpose of conferring further powers on the company, even although the application to Parliament had been pursuant to a resolution passed by three-fourths of the shareholders in compliance with the Wharnccliffe order (a). The application of the funds of a company towards making up the parliamentary deposit required for bills in Parliament promoted by another company (b), or towards repaying monies borrowed by the promoters, and subscribed by them in conformity with the standing orders of Parliament (c), is improper.

The funds of a company may, however, be applied in discharging expenses incurred in opposing in Parliament a bill, which would, if sanctioned, be injurious to the company's interests (d).

The distinction between going to Parliament for an alteration

(r) 10 Ha. 62.

(s) *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C. B. 775; *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653.

(t) *Great Western Railway Co. v. Rushout*, 5 De G. & S. 309.

(u) *Vance v. East Lancashire Railway Co.*, 3 K. & J. 50.

(x) *Munt v. Shrewsbury and Chester Railway Co.*, 13 Beav. 1.

(y) *Sterens v. South Devon Railway Co.*, ib. 59.

(z) *Simpson v. Denison*, 10 Ha. 51.

(a) *Caledonian Railway Co. v. Solway Junction Railway Co.*, W. N. (1883) 179, 49 L. T. 527.

(b) *Maunsell v. Midland Great Western Railway Co. of Ireland*, 1 H. & M. 130.

(c) *Spackman v. Lattimore*, 3 Giff. 16.

(d) *Bright v. North*, 2 Ph. 216; *Att.-Gen. v. Andrews*, 2 Mac. & G. 230; *Att.-Gen. v. Mayor of Wigan*, 5 D. M. & G. 54; *Att.-Gen. v. Mayor of Brecon*, 10 C. D. 204.

Chap. XVIII. of the constitution, or a variation or extension of the powers of a company, and applying the funds of the company towards the payment of the expenses thereby incurred is a well-defined one (e). Every company acting in its corporate capacity has full power to make an application to Parliament for these or other purposes. There is no ground on which a Court of equity can interfere (f). In *Bill v. Sierra Nevada Co.* (g), the Court would not restrain a company from applying to the legislature of a foreign country, even though nearly all the shareholders were resident in England, there appearing to be no intention on the part of the company to act except with the sanction of the foreign legislature. In *Astley v. Manchester, Sheffield, and Lincolnshire Railway Co.* (h), the Court refused to restrain a railway company, which had taken lands of the plaintiff under their compulsory powers for the purpose of making a railway, from making an application to Parliament upon the abandonment of the railway to enable them to use the land for a different purpose and in a different undertaking.

The Court will not take into consideration the possibility of further powers being obtained.

When a public company incorporated by Statute is engaging in a transaction which is *ultra vires*, the Court can only deal with the case as it exists, and will not take into consideration the possibility of further powers being obtained by the company (i).

Contracts not within the proper purposes of the company are void at law.

Where a contract is one which, from the nature and object of incorporation, a corporate body is by necessary or reasonable inference from the provisions of the deed of settlement or the Act prohibited from making, it is *ultra vires*, and void (k). "Where," said Lord Wensleydale, in *South Yorkshire Railway Co. and River Dun Navigation Co. v. Great*

(e) *Simpson v. Denison*, 10 Ha. p. 61; *Sterens v. South Devon Railway Co.*, 13 B. 49.

(f) *Vance v. East Lancashire Railway Co.*, 3 K. & J. 57; *Stevens v. South Devon Railway Co.*, 13 Beav. 49.

(g) 1 D. F. & J. 177, 183.

(h) 2 D. & J. 463.

(i) *Great Western Railway Co. v.*

Metropolitan Railway Co., 32 L. J. Ch. 382.

(k) *Shrewsbury and Birmingham Railway Co. v. London and North Western Railway Co.*, 6 H. L. C. 136; *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 673; *Att.-Gen. v. Great Eastern Railway Co.*, 5 App. Ca. 481; *Wenlock v. Der River Co.*, 10 App. Ca. 360.

Northern Railway Co (l), "a corporation is created by Act of Parliament for particular purposes with special powers, their deed, though under their corporate seal, does not bind them, if it appear by the express provisions of the Statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires*; that is, that the legislature meant that such a deed should not be made" (m). Chap. XVIII.

The doctrine of *ultra vires* must, however, be reasonably understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires* (n). Thus a company incorporated for the purpose of keeping a hotel was held entitled to lease part of the hotel for a short term of years to the head of a government department (o). So also a railway and steam ferry company may lend out its ferry boats on excursion trips, when not wanted for the ferry (p). So also a contract between a railway company and an individual to run a steamer between the terminus of the railway in England and the coast of Ireland was held valid, as being in furtherance of the object for which the company was formed and incorporated, viz., to facilitate communication between England and Ireland (q). So also the directors of a fire insurance company may, in the exercise of their discretion, make payments to persons insured in respect of losses not falling strictly within the terms of the policies, if such payments are conducive to the welfare of the company and calculated to promote its interest, or if the payment of such losses is in accordance with the usual custom of other insurance companies (r). But where the

The application of funds of company to a purpose legitimately connected with objects of company.

(l) 9 Exch. 55, 84.

(m) *Chambers v. Manchester and Milford Railway Co.*, 5 B. & S. 588.

(n) *Att.-Gen. v. Great Eastern Railway Co.*, 5 A. C. 478, per Lord Selborne.

(o) *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Featherstonhaugh v. Lee Moor Porcelain Co.*, 1 Eq. 329.

(p) *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 30 Beav. 40, affirmed on other grounds, 4 D. F. & J. 126.

(q) *South Wales Railway Co. v. Redmond*, 10 C. B. N. S. 675. See *Warden of Dover Harbour v. South Eastern Railway Co.*, 9 Ha. 489. *Comp. Simpson v. Denison*, 10 Ha. 62.

(r) *Taunton v. Royal Insurance*

Chap. XVIII. primary and special object for which a company has been formed is gone, it cannot continue to carry on business for objects which are merely ancillary and subservient to the main object (s).

A company's memorandum of association frequently contains wide general words which, if construed literally, would entitle the company to carry on almost any kind of business. But such words "must be taken within certain limits, and those limits are that they must be regarded as ancillary to the purport of the scheme for which the company was formed" (t). General words in a memorandum of association must be construed in such a way "as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are" (u).

This principle of construction will be adopted even though the memorandum contain a clause that the objects specified in each paragraph are to be in no wise limited or restricted by reference to, or inference from the terms of any other paragraph, or the name of the company (x).

One company may not purchase the business of another company (y), or transfer its business (if not in liquidation) (z) to (a) or amalgamate with another company (b), unless specially

Co., 2 H. & M. 135; and see *Breay v. Royal British Nurses Association*, (1897) 2 Ch. pp. 277, 278.

(s) *Amalgamated Syndicates, Ltd.*, (1897) 2 Ch. 600.

(t) *German Date Coffee Co.*, 20 C. D. p. 187, per Baggallay, L.J.

(u) *German Date Coffee Co.*, 20 C. D. p. 188, per Lindley, L.J.

(x) *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, (1902) 1 Ch. 745.

(y) *Ernest v. Nicholls*, 6 H. L. C. 401; *Ashbury Carriage Co. v. Riche*, 1 L. R. 7 H. L. 653.

(z) See sect. 161 of the Companies Act, 1862.

(a) *Great Northern Railway Co. v. Eastern Counties Railway Co.*, 9 Ha. 306; *Bird v. Bird's Patent, &c., Sewage Co.*, 9 Ch. 358; *Richmond Waterworks Co. v. Vestry of Richmond*, 3 C. D. 98; *Sevenoaks and Tunbridge Railway Co. v. London, Chatham, and Dover Railway Co.*, 11 C. D. 638. But comp. *Southall v. British Mutual, &c., Society*, 6 Ch. 614.

(b) *Re Era Insurance Co.*, 2 J. & H. 400; *Clinch v. Financial Corporation*, 4 Ch. 117.

authorised to do so either by the deed of settlement, or the memorandum of association, or the Act of incorporation. General powers of management or powers to enter into contracts or arrangements with other companies do not authorise an amalgamation (c). Chap. XVIII.

Even where there is no express prohibition against borrowing, a company or society constituted for special purposes cannot borrow unless such borrowing is expressly authorised, or is clearly incidental to the course and conduct of the business for its proper purposes (d). An ordinary trading company, however, has an implied power to borrow, without express words conferring such a power (e). A power to borrow up to a limited amount on certain terms implies a prohibition to borrow a larger amount, or on different terms (f). Accordingly, a railway company, although having power under its special Act to borrow, cannot draw, accept, or indorse bills of exchange unless expressly so authorised (g). Borrowing monies.

A company has no right, unless authorised by its special Act or charter, or (in the case of companies governed by the Companies Act, 1862) by its memorandum or articles, to issue preference shares (h). But a company governed by the Companies Act, 1862, may, by special resolution, alter its articles so as to permit of the issue of preference shares by way of increase of capital (i). Preference shares.

A traffic agreement between two railway companies for a certain number of years to divide the profits of the whole traffic in certain fixed proportions calculated on the past Working agreements between railway companies.

(c) *Re Era Insurance Co.*, 2 J. & H. 400. *Comp. Re Bank of Hindustan, Higgs' case*, 2 H. & M. 657. See, however, as to amalgamation of railway companies, 26 & 27 Vict. c. 92, ss. 36—55.

(d) *Blackburn Society v. Brooks*, 22 C.D. 61, 70 (C.A.). See, however, sect. 38 of the Companies Clauses Act, 1845, as to companies which incorporate the same.

(e) *General Auction Co. v. Smith*, (1891) 3 Ch. 432.

(f) *Wenlock v. River Dee Co.*, 10 A. C. 354.

(g) *Bateman v. Mid Wales Railway Co.*, L. R. 1 C. P. 499.

(h) See *Harrison v. Mexican Railway Co.*, 19 Eq. 358; *Andrews v. Gas Meter Co.*, (1897) 1 Ch. p. 368 (C. A.).

(i) *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361 (C. A.), overruling *Hutton v. Scarborough Cliff Hotel Co.*, 4 D. J. & S. 672.

Chap. XVIII.

course of traffic, and entered into *bonâ fide* for the purpose of avoiding competition is not *ultra vires* (k); and a breach of such agreement will be restrained by injunction (l). The managing body of a railway company, however, have no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway, which the company may be thereafter empowered to construct, so as to give another company an interest in such traffic and profit (m).

In a case where a railway company was authorised to enter into an agreement with another railway company for working the line, it was held that they might manufacture carriages and rolling stock for and let them for hire to the other company (n).

Agreement to
apply to Parlia-
ment for powers.

An agreement between two railway companies to make an application to Parliament for the necessary powers to carry out certain heads of agreement between them, which are not to be acted on until the necessary powers have been obtained, is not illegal (o); but any attempt to act upon the agreement before the necessary powers have been obtained is illegal (p).

Agreement legal
in part but
illegal in its
purpose.

An agreement cannot be considered legal, though some of the terms involve acts which may be lawfully done, if the purpose of the agreement be to work out something illegal. Therefore where railway companies agree to do acts which they have power to do, as well as others which they have no power to do, their object being to carry out an illegal scheme, the Court will restrain the agreement from being acted upon at all (q).

Agreement
partly legal,
partly illegal.

A shareholder in a company, the directors of which have affixed the company's seal to an agreement some of the provisions whereof are illegal, is entitled to restrain the directors from acting upon the agreement so far as it is illegal (r).

(k) *Hare v. London and North Western Railway Co.*, 2 J. & H. 80.

(l) *Midland Railway Co. v. Great Western Railway Co.*, 8 Ch. 841.

(m) *Midland Railway Co. v. London and North Western Railway Co.*, 2 Eq. 525.

(n) *Att.-Gen. v. Great Eastern Railway Co.*, 5 A. C. 478.

(o) *Winch v. Birkenhead, &c., Railway Co.*, 5 De G. & S. 562.

(p) *Hattersley v. Lord Shelburne*, 31 L. J. Ch. 873.

(q) *Ib.*

(r) *Maunsell v. Midland Great Western Railway Co. of Ireland*, 1 H. & M. 133; 32 L. J. Ch. 513.

Contracts entered into by promoters on behalf of an intended company do not bind the company after its incorporation, unless so provided by statute (s); nor can the company ratify such a contract (t), but it can, of course, enter into a new contract to the like effect (u).

Chap. XVIII.

Agreements by promoters.

In the case of companies in which the public are invited to subscribe for shares, contracts entered into by such a company before it is entitled to commence business are provisional only (x).

If a contract between two companies is illegal, the Court will not assist either of the parties in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object of the agreement (y).

Court will not aid either of the parties to an illegal agreement.

An act, although it may be beyond the powers of the directors or managing body of a company, may be capable of being adopted and confirmed at a meeting of the shareholders. If so, the question is properly a subject of internal regulation and management, and the Court will not interfere until all reasonable attempts have been made to take the sense of the general body of the shareholders on the matters in question. Before applying to the Court, all the means provided by the articles, the deed of settlement, or the Act of Incorporation, as the case may be, for the purpose of bringing the matter before the general body of the shareholders must be resorted to and exhausted (z). Accordingly

Court will not interfere in matters which are properly a subject for internal regulation.

(s) *Kelner v. Baxter*, L. R. 2 C. P. 174; *In re Northumberland Avenue Hotel Co.*, 33 C. D. 16 (C. A.); *Caledonian Railway Co. v. Helensburgh*, 2 Macq. 391. As to contracts entered into by promoters of railway companies, see sect. 30 of the Railways Construction Act, 1864.

(t) *Kelner v. Baxter*, ante; *Empress Engineering Co.*, 16 C. D. 125 (C. A.); *Northumberland Avenue Hotel Co.*, 33 C. D. 16 (C. A.).

(u) *Empress Engineering Co.*, 16 C. D. p. 128; *Northumberland Avenue Hotel Co.*, 33 C. D. p. 20. As to when a new contract will be

inferred, see *Bagot Co. v. Clipper Co.*, (1901) 1 Ch. 196; (1902) 1 Ch. 146.

(x) Sect. 6 of the Companies Act, 1900.

(y) *Great Northern Railway Co. v. Eastern Counties Railway Co.*, 9 Ha. 306; *Richmond Waterworks Co. v. Vestry of Richmond*, 3 C. D. 82, 98.

(z) *Mozley v. Alston*, 1 Ph. 800; *Lord v. Copper Mining Co.*, 2 Ph. 740; *Gray v. Lewis*, 8 Ch. 1050; *Macdougall v. Gardiner*, 1 C. D. 21; *Burland v. Earle*, (1902) A. C. 83, 93.

Chap. XVIII. where two members of an incorporated company had filed a bill against the directors and others, charging them with fraudulent and illegal acts and praying for the appointment of a receiver, the Court refused to interfere on the ground that the acts complained of were capable of confirmation, and that it did not appear that any attempt had been made to bring the matter before the general body of the shareholders (a). So also, and upon the same grounds, in an action brought by certain shareholders to restrain persons alleged to have been irregularly appointed directors from acting as such, the Court refused to interfere (b). In like manner the Court refused to restrain directors from excluding one of their number from acting when the majority of the members of the company did not wish him to act (c). So also the Court will not interfere for the purpose of forcing companies to conduct their business according to the strictest rules where the irregularity complained of can be set right at any moment, as for instance where there has been some informality in summoning a board meeting (d).

Upon the same grounds the Court has refused to restrain the payment of a dividend by a railway company before its works were completed (e), or before its unsecured debts were paid (f). So also the Court will not restrain a company from making a call, if made in a proper form and for a proper purpose (g), there being no equity upon which the Court can inquire into the propriety or necessity of making a call (h). Nor will the Court restrain actions for calls on shares improperly forfeited (i), or actions for calls where the monies

(a) *Foss v. Harbottle*, 2 Ha. 461; *Pulbrook v. New Civil Service Association*, W. N. (1878), 146, 26 W. R. 11.

(b) *Mozley v. Alston*, 1 Ph. 790; *Hattersley v. Lord Shelburne*, 31 L. J. Ch. 873; *Harben v. Philipps*, 23 C. D. 14; *Imperial Hydropathic Hotel Co. v. Hampson*, ib. 1.

(c) *Bainbridge v. Smith*, 41 C. D. 462 (C. A.).

(d) *Browne v. La Trinidad*, 37 C. D. 1 (C. A.).

(e) *Browne v. Monmouthshire Railway Co.*, 13 Beav. 32.

(f) *Stevens v. South Devon Railway Co.*, 9 Ha. 313.

(g) *Cooper v. Shropshire Union Railway Co.*, 6 Ra. Ca. 136.

(h) *Macbride v. Lindsay*, 9 Ha. p. 574; *Bailey v. Birkenhead, Lancashire, and Cheshire Junction Railway Co.*, 12 Beav. 433.

(i) *Harris v. North Devon Railway Co.*, 20 Beav. 384; *Playfair v.*

raised by the calls have been improperly applied (*k*) or the enforcement of a call by directors, there being no evidence of an improper motive in making it (*l*).

So also the Court will not restrain the application of monies raised by the issue of new shares to a purpose different from that for which they were raised (*m*): or the payment of money to directors by way of remuneration for past as well as future services (*n*): the application by the directors of a portion of the funds in gratuities to servants of the company for services rendered (*o*), provided that the company is a going company (*p*); or in paying a pension to the family of a deceased officer of the company (*q*).

Nor will the Court interfere to restrain a meeting of the shareholders of a company from being held upon the ground that the notice calling it is so expressed that consistently with its terms resolutions might be passed which are *ultra vires* (*r*).

If, however, it is absolutely necessary that the Court should interfere to prevent irreparable mischief from being done before the time for taking the necessary steps to call a general meeting of the shareholders can arrive (*s*), or if the directors are adopting a particular course for the express purpose of preventing the free action of the shareholders (*t*); or if the directors, or a majority of the shareholders, are acting in a fraudulent or oppressive manner against the minority (*u*), the Court will interfere.

In particular cases Court may interfere in matters which are properly a subject for internal regulation.

Birmingham, Bristol, &c., Railway Co., 1 Ra. Ca. 640.

(*k*) *Orr v. Glasgow, &c., Railway Co.*, 3 Macq. 799.

(*l*) *Anglo - Universal Bank v. Baragnon*, 45 L. T. 362; *Dawson v. African Consolidated Land Co.*, (1898) 1 Ch. 6, 14 (C. A.).

(*m*) *Yetts v. Norfolk Railway Co.*, 3 De G. & S. 293.

(*n*) *Lambert v. Northern Buenos Ayres Railway Co.*, 18 W. R. 180; *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358 (C. A.).

(*o*) *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754, not so

however if the company is no longer a going concern and exists only for the purpose of winding up. *Hutton v. West Cork Railway Co.*, 23 C. D. 654.

(*p*) *Hutton v. West Cork Railway Co.*, 23 C. D. 654 (C. A.).

(*q*) *Henderson v. Bank of Australasia*, 40 C. D. 170.

(*r*) *Isle of Wight Railway Co. v. Tahourdin*, 25 C. D. 320 (C. A.).

(*s*) *Great Western Railway Co. v. Rushout*, 5 De G. & S. 310.

(*t*) *Fraser v. Whalley*, 2 H. & M. 10.

(*u*) *Gray v. Lewis*, 8 Ch. 1035; *Menier v. Hooper's Telegraph Works*,

Chap. XVIII.

Instances of
injunctions
granted in
such cases.

Directors accordingly have been restrained from issuing shares for the express purpose of thereby controlling a general meeting (*x*); or from exercising their powers so as to place themselves in a better position in regard to the payment of calls than the other shareholders (*y*); or from employing the funds of the company to get into their own hands the majority of the voting power, as by sending proxy papers with their own names inserted as proxies, and impressed with a stamp so that each shareholder who did not attend the meetings might if he pleased sign and return the proxy without any expense to himself (*z*); or from summoning the general meeting at such a date as to deprive shareholders of their power of voting (*a*); or from holding an irregular meeting not properly convened which was likely to be injurious to the interest of the company (*b*); or from using the corporate name and powers for the purpose of dividing amongst the majority, to the exclusion of the minority, consideration money received from an arrangement with another company (*c*).

So also where the votes of certain shareholders had been improperly rejected at a meeting of the company, an injunction was granted to restrain the company from acting on the footing of the votes being bad (*d*). So also if directors, acting under an erroneous construction of their articles, are intending to exclude from voting those who ought to vote, or if directors are intending to act on a resolution improperly come to in a matter essential as regards the well-being of the company, the Court will interfere (*e*). So also directors were restrained from issuing a circular which was of a misleading tendency and from proposing at a general meeting of the company certain

9 Ch. 350; *Spokes v. Grosvenor Hotel Co.*, 13 T. L. R. 431.

(*x*) *Fraser v. Whalley*, 2 H. & M. 10.

(*y*) *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56 (C. A.).

(*z*) *Studdert v. Grosvenor*, 33 C. D. 528.

(*a*) *Cannon v. Trask*, 20 Eq. 669.

(*b*) *Harben v. Philipps*, 23 C. D. p. 34 (C. A.).

(*c*) *Menier v. Hooper's Telegraph Works*, 9 Ch. 350.

(*d*) *Pender v. Lushington*, 6 C. D. 70.

(*e*) *Harben v. Philipps*, 23 C. D. 14, 33 (C. A.).

resolutions on the ground that the shareholders had not been fully informed and instructed upon what was proposed to be done (*f*). Chap. XVIII.

The notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting; and the pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is for this purpose a material fact (*g*). So also, where an agreement entered into between two companies for the sale of the undertaking of the one to the other and which provided for compensation being paid to the directors of the selling company for their loss of office, had been confirmed by a general meeting, but the notice calling the meeting described the agreement merely as an agreement for the sale of the undertaking and did not mention the proposed payment to the directors, an injunction was granted restraining the company from carrying the agreement into effect until duly sanctioned by the shareholders at a meeting duly convened for the purpose (*h*).

The existence of disputes between the different members of the governing body of a company which prevents its affairs being carried on properly, is a ground for the intervention of the Court by injunction and receiver to protect the property of the company, but the interference of the Court will be continued only until a governing body is duly appointed (*i*).

Where there is a body corporate capable of suing, that body only is the proper plaintiff in an action for the recovery of property, whether from its officers or directors or from any other person, and an action for that purpose cannot be maintained by one shareholder on behalf of himself and all others except the defendants (*k*). But this rule does not hold where Frame of action.

(*f*) *Jackson v. Munster Bank*, 13 L. R. I. 119. 298; *Trade Auxiliary Co. v. Vickers*, 21 W. R. 836.

(*g*) *Tiessen v. Henderson*, (1899) 1 Ch. 861. (*k*) *Gray v. Lewis*, 8 Ch. 1035; *Russell v. Wakefield Waterworks Co.*, 44 L. J. Ch. 498; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474; *Burland v. Earle*, (1902) A. C. p. 93.

(*h*) *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358, 370 (C. A.).

(*i*) *Featherstone v. Cooke*, 16 Eq.

Chap. XVIII.

the persons against whom the relief is sought control the majority of the company's shares, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names (*l*). This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character, or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company (*m*).

"There may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done" (*n*). In such a case, therefore, if individual shareholders bring an action, using the name of the company, they do so at their own risk unless able to show that they have the support of the majority (*o*); and if the Court grant interlocutory relief, it will take care that a meeting be called at an early date to

(*l*) *Burland v. Earle*, (1902) A. C. p. 93.

(*m*) *Burland v. Earle*, (1902) A. C. 83, 93; and see *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474.

(*n*) *Macdougall v. Gardiner*, 1 C. D. p. 22, per James, L.J.

(*o*) *Macdougall v. Gardiner*, 1 C. D. 13, 22 (C. A.); *Pender v. Lushington*, 6 C. D. 70; *Imperial Hydro-pathic Hotel Co. v. Hampson*, 23 C. D. 1 (C. A.); *La Compagnie de Mayville v. Whitley*, (1896) 1 Ch. 788 (C. A.).

determine whether the action has in fact the approval of the majority of the shareholders (p). Chap. XVIII.

Where an action is brought by a shareholder against the directors, who hold a preponderance of shares in the company, the proceeding may be in the form of an action by the plaintiff on behalf of himself and all other shareholders in the company (other than the defendants), the company being joined as co-defendants (q). "An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name" (r).

A director of a company duly and legally appointed may sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as director (s). It is immaterial that he may in the opinion of his co-directors be unfit to be a director of the company by reason of alleged misconduct. If the other directors think that one of their number is unfit to act, their course is to bring the case before the shareholders and enable them to take such action as they think fit. The other directors have no right to take the matter in their own hands and exclude him from acting as director (t).

In a case in which a director brought an action to restrain his co-directors from excluding him from acting as managing director of the company, the Court of first instance granted the injunction; but on appeal, the Appeal Court suspended the injunction upon the undertaking of the defendants to call a general meeting. The general meeting was called, and the shareholders passed a resolution that they did not desire the plaintiff to act as managing director, and the Court thereupon dissolved the injunction (u).

(p) *Ib.*

(q) *Menier v. Hooper's Telegraph Works*, 9 Ch. 350; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56, 69 (C. A.).

(r) *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. p. 69, per Lindley, M. R.

(s) *Pullbrook v. Richmond Mining Co.*, 9 C. D. 610; *Munster v. Cammell Co.*, 21 C. D. 183.

(t) *Kyshe v. Alturas Gold Co.*, 36 W. R. 496.

(u) *Bainbridge v. Smith*, 41 C. D. 462 (C. A.).

Injunction on application of one director to restrain the others from excluding him from acting as director.

Chap. XVIII.

A company may not be registered, or carry on business, under a name calculated to deceive.

Section 20 of the Companies Act, 1862, provides that no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires. The section further provides that if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name.

The principles upon which injunctions are granted in the case of individuals trading under identical or similar names, apply also in the case of companies (x). There is nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company, which, notwithstanding the prohibition in sect. 20, has been registered under a similar name, from carrying on business under that name, if it appears that such name is calculated to deceive (y).

It is more usual, however, to apply for an injunction before the new company is registered. On an application to restrain the registration of a new company with a title alleged to be so similar to that of the plaintiffs as to be calculated to deceive, the Court will have regard to the kind of business which has been or is intended to be carried on by the plaintiff company, and to that which is intended to be carried on by the new company, and also to the kind of name which has been adopted by the plaintiff company (z).

Where a motor-car manufacturing company was registered in a name colourably resembling that of existing motor-car

(x) *Merchant Banking Co. of London v. Merchants' Joint Stock Bank*, 9 C. D. 560. (1898) 1 Ch. 539 (C. A.); (1899) A. C. 88.

(y) *Ib.*; *Manchester Brewery Co. v. North Cheshire and Manchester* (1902) 2 Ch. 319.

manufacturers with the fraudulent intention of obtaining the benefit of their reputation in that business, such company and the signatories to the memorandum (who were the only directors and shareholders) were restrained from using such name in connection with the manufacture or sale of motor-cars. An injunction was also granted restraining the signatories from allowing the company to remain registered under the name so adopted, or under any title or description colourably resembling the same (a).

(a) *La Société Anonyme, &c. v. Panhard Levassor Motor Co.*, (1901) 2 Ch. 513.

CHAPTER XIX.

INJUNCTIONS AGAINST CLUBS, SOCIETIES, ETC.

Chap. XIX.

WHERE parties contribute funds which are laid out on property which all enjoy in common, such as clubs, societies, associations, &c., the members of which have agreed to bind themselves by certain rules, they are bound by their rules, and the Court will not interfere, except in cases of breach of trust or oppression (a). The jurisdiction of the Court in such cases is founded on the common interest of every member in the property of the club, society, &c., and on the common right of every member to require that the rules to which he has subscribed shall be properly carried out (b).

But although in the case of an ordinarily constituted club, in which members have rights of property, a member whose rights have been interfered with by the committee is entitled to ask the Court to consider whether the rules of the club have been observed, whether anything has been done which is contrary to natural justice, and whether the decision complained of has been come to *bonâ fide*, it is otherwise in the case of a proprietary club (c).

Expulsion from
a club.

The Court has jurisdiction to restrain the committee or a general meeting of a club (not being a proprietary club) from expelling a member of the club, but in exercising the jurisdiction the Court does not sit as a Court of Appeal from the decision of the members of the club duly assembled. All that the Court requires is that their proceedings be conducted on the common principles of ordinary justice. The Court will not

(a) See *Clough v. Ratcliffe*, 1 De G. & Sm. 164; *Yeates v. Roberts*, 7 D. M. & G. 227; *Queen v. D'Eyncourt*, 4 B. & S. 832.

(b) See *Millican v. Sullivan*, 4 Times Rep. 204.

(c) *Baird v. Wells*, 44 C. D. 661.

interfere against the decision of the members of a club expelling a member of the club unless it can be shown either that what has been done is not authorised by any rule of the club or is not regular, or that, if it be within any rule of the club, the rule is not consonant with the principles of natural justice, or that there has been *mala fides* or malice in arriving at the decision (d). The Court has first to consider whether the action of the committee or of the general meeting was authorised by any rule, that is to say, whether it was within the terms of any rule and whether it was regular (e). The rules of the club as to the formalities necessary for the expulsion of a member by the committee or by a general meeting must be strictly complied with. The general meeting must be summoned with proper notice and the resolution must be carried by a sufficient majority. If the meeting has been irregularly called or the resolution has been carried by an insufficient majority, the Court will at the instance of the member so proceeded against restrain the club by injunction from interfering with his rights of membership (f).

The proceedings must be regular.

The next thing for the Court to consider is whether the committee or general meeting of a club, in convicting a member of an offence warranting his expulsion from the club, have acted on the principles of natural justice. Though what is done may be within the rules of the club, it may be contrary to natural justice. It would be a denial of natural justice, if a decision was come to expelling a man without giving him an opportunity of stating his case and defending his conduct. Where the conduct of one of its members is impugned, notice ought to be given to that member that his conduct is about to be inquired into, in order that he may have an opportunity of stating his case and defending his conduct. The Court will at the instance of any member of a club declare any resolution passed without previous notice to him based upon *ex parte* evidence purporting to expel him from the club to be null and void, and will restrain the club by injunction from

The member must have opportunity of being heard.

(d) *Baird v. Wells*, 44 C. D. 661. (1881) 171.

(e) *Dawkins v. Antrobus*, 17 C. D. 615. See *Foster v. Harrison*, W. N. 615. (f) *Labouchere v. Leake & Wainwright*, 13 C. D. 346.

Chap. XIX.

The power of
expulsion must
be exercised
bonâ fide.

interfering by virtue of such resolution with his rights of membership (g).

If the proceedings of the committee or members of a club in expelling a member have been in strict accordance with the rules and the rules are not in any way contrary to natural justice, the next consideration for the Court is whether the proceedings have been in the *bonâ fide* honest exercise of the powers given by the rules. If the committee, acting *bonâ fide* and without malice, come to the conclusion that a man is not a fit member of the club, or that his conduct is injurious to the interests of the club, the Court will not interfere. It is not for the Court to consider whether it should have arrived at the same conclusion or not. The Court has no right to consider whether what was done was right or not, or even as a substantive question whether what was decided was reasonable or not. The only question is whether it was *bonâ fide*. The question whether the decision was erroneous or not can only be taken into consideration in determining whether that decision is so absurd or evidently wrong as to afford evidence that the action was not *bonâ fide*, but was malicious or capricious or proceeding from something other than a fair and honest exercise of the powers given by the rule. The fact that a decision is unreasonable may be strong evidence of malice, but is not conclusive and may be rebutted by evidence of *bona fides* (h).

In a case where one of the rules of a club provided that in case the conduct of any member should in the opinion of the committee be injurious to the character and interests of the club, the committee should be empowered to recommend such member to resign, and if he should not comply, the committee should then call a general meeting which should by a certain majority have power to expel him; and the plaintiff, a member

(g) *Ib.*; *Fisher v. Keane*, 11 C. D. 44 C. D. 661.
353; *Dawkins v. Antrobus*, 17 C. D. 634; *Foster v. Harrison*, W. N. (1881) 171; *Lambert v. Addison*, 46 L. T. N. S. 24; *Anderson v. Salmon*, W. N. (1888) 102; *Baird v. Wells*,

(h) *Labouchere v. Lord Wharncliffe*, 13 C. D. 352; *Dawkins v. Antrobus*, 17 C. D. 623 (C. A.); *Lambert v. Harrison*, 46 L. T. N. S. 24.

of the club, sent a pamphlet reflecting on the conduct of S., a gentleman in high official position, also a member of the club, to S. at his official address enclosed in an envelope, on the outside of which was printed, "Dishonourable conduct of S.," the committee being of opinion that this action was injurious to the character and interests of the club, called upon the plaintiff for an explanation of his conduct, which he refused to give. They then called on him to resign, and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the plaintiff from the club. The Court would not interfere to restrain his expulsion from the club (i).

Committees in cases of the kind are not expected to act on strictly legal evidence. A committee in arriving at a conclusion may be drawn to it by one of a great many circumstances which are well known in the club and quite true in fact and detail, though not at the moment proved before them. They may consider the immediate conduct a culminating act, although they may not have so expressed it (k).

One of the rules of a club provided that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority, and it was held that a rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the club could be validly passed by a general meeting, provided all the requisite formalities were complied with (l).

It is the duty of the Court to construe the rules fairly and in the same way as it construes any other contract. The Court has no right to give the words any other than their ordinary meaning or to construe the rules otherwise than in their ordinary sense (m).

Where the rules of a club at the date when a person becomes a member contain no provision for altering the same

(i) *Dawkins v. Antrobus*, 17 C. D. 615 (C. A.).

(l) *Ib.*

(m) *Ib.*, *per* Jessel, M. R.

(k) *Ib.* 623, *per* Jessel, M. R.

Chap. XIX.

from time to time, it seems that the annual subscription cannot be raised, as against such member. Accordingly, in a recent case, an injunction was granted restraining a club from excluding the plaintiff (who had refused to pay an increased subscription), and from preventing him exercising his rights as a member (n).

Trade union.

The Court has jurisdiction at the instance of a member of a trade union to prevent his being expelled from the society. The foundation of the jurisdiction is the right of property vested in the member of the trade union of which he is unjustly deprived by such unlawful exclusion. If there is no property the Court will not interfere (o). Nor will the Court interfere at the suit of a member of a trade union to restrain the committee and trustees of the union claiming to be entitled to participate in its benefits from expelling him for breaking the rules of the union, where the action is in fact brought to enforce an agreement between the members of the trade union to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, which the Court is not by that section enabled to enforce, and where apart from the Act the union is an illegal association (p).

These principles are equally applicable where a central society sues a branch, or a society sues an individual, or an individual sues a society. Where accordingly a dispute arose between the head establishment and a branch of a benefit society which was governed by rules, which besides providing for the benefit of its members contained rules in restraint of trade, and the branch threatened to secede, whereupon an action was brought by the head establishment for an injunction to restrain the branch establishment from dividing the funds in their possession, the Court would not entertain the action (q).

An injunction, however, may be granted on the application of any of the members of a trade union to restrain the officials or agents of the union from applying the funds in a manner

(n) *Harrington v. Sendall*, W. N. (1903) 50.

(o) *Rigby v. Connol*, 14 C. D. 487.

(p) *Ib.*; *Chamberlain's Wharf, Ltd. v. Smith*, (1900) 2 Ch. 605.

(q) *Duke v. Littleboy*, 28 W. R. 977.

contrary to an agreement to provide benefits for members (*r*). Chap. XIX.

In such a case, the Court does not "directly enforce" (within the meaning of the Trade Union Act, 1871, s. 4) the alleged agreement by granting an injunction (*s*).

(*r*) *Howden v. Yorkshire Miners' Association*, (1908) 1 K. B. 308 (C. A.). 21 C. D. 194; *Tuff Vale Railway Co. v. Amalgamated Society of Railway Servants*, (1901) A. C. p. 428.

(*s*) *Ib.*; and see *Wolfe v. Matthews*,

CHAPTER XX.

INJUNCTIONS AGAINST CORPORATIONS.

Chap. XX. CORPORATIONS have *primâ facie* at common law, and apart from statutory restrictions, full power, like individuals, of dealing with their property (a). The application of the property of a common law corporation to other than corporate purposes is not in general a ground for the interference of the Court unless a breach of trust can be shown (b). But if corporate property be affected by a trust, the power and jurisdiction of the Court to enforce and execute the trust attaches equally as it does upon other property similarly circumstanced (c). The burthen of proof lies on the party who seeks to establish the trust (d).

Power of dealing
with corporate
property.

In *Attorney-General v. Corporation of Cashel* (e), where the members of the corporation had to take an oath against alienation generally, Lord St. Leonards held that a trust not to alienate must be inferred; but in *Evan v. Corporation of Avon* (f), where the oath which the members of the corporation had to take was against alienation so as to prejudice the corporation, the Court held that no trust was created, and that the corporation itself had the power of determining whether a sale was prejudicial or not, and allowed a demurrer to a bill for an injunction to restrain a corporation from selling part of the corporate property, there being no evidence of fraud on the part of the corporation.

(a) *Evan v. Corporation of Avon*, 29 Beav. 144, 149; *Att.-Gen. v. St. John's Hospital, Bedford*, 2 D. J. & S. 635; *In re Patent File Co.*, 6 Ch. 86, 87.

(b) *Parr v. Att.-Gen.*, 8 Cl. & Fin. 3; *Att.-Gen. v. Portreeve of Avon*, 3 D. J. & S. 635.

(c) *Att.-Gen. v. Mayor, &c. of Dublin*, 1 Bligh, N. S. 312; *Att.-Gen. v. St. John's Hospital*, 2 D. J. & S. 635.

(d) *Evan v. Corporation of Avon*, 29 Beav. 144.

(e) 3 Dr. & War. 294, 314.

(f) 29 Beav. 144.

The Court will interfere at the suit of a member of the corporation to prevent a forfeiture of the charter of the corporation (*g*), or to prevent the corporation from surrendering its charter with a view to obtaining a new charter for an object different from that for which the original charter was granted (*h*).

If there be a trust and the trust be for public purposes, or the act complained of affects the revenues of the corporation, the suit should be instituted by the Attorney-General at the instance of a relator, who, if he has any interest in the matter, may join as plaintiff (*i*). If the Attorney-General declines to interfere, and the parties differ among themselves as to the proper mode of administering the trust, a certain number may file a bill on behalf of themselves and others, making some of the dissentients and the Attorney-General defendants (*k*). If the trust be of a private nature, or the act complained of does not affect the revenues of the corporation, the suit must be by action (*l*), and the Attorney-General should not be made a party (*m*). A corporation may itself institute the suit, although the transactions complained of may have been carried into effect in its name by the governing body (*n*).

The Courts have no jurisdiction to interfere with the discretion of the Attorney-General in consenting, or refusing to put the law in motion in matters affecting the public (*o*). "If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it is for the Attorney-General, and not for the Courts, to determine whether he ought to initiate litigation in that respect or not" (*p*).

(*g*) *Rendall v. Crystal Palace Co.*, 4 K. & J. 327. Ves. 1; *Davis v. Jenkins*, 3 V. & B. 157.

(*h*) *Ward v. Society of Attornies*, 1 Coll. 370, 379. (*m*) *Att.-Gen. v. Portreeve of Avon*, 3 D. J. & S. 637.

(*i*) *Att.-Gen. v. Mayor of Dublin*, 1 Bligh, N. S. 347; *Att.-Gen. v. Portreeve of Avon*, 3 D. J. & S. 651. (*n*) *Att.-Gen. v. Wilson*, Cr. & Ph. 1.

(*k*) *Lang v. Purves*, 15 Moo. P. 389. (*o*) *London County Council v. Att.-Gen.*, (1902) A. C. 165.

(*p*) (1902) A. C. p. 168, *per Lord Halsbury*, L. C.

(*l*) *Att.-Gen. v. Newcombe*, 14

Chap. XX.
Proceedings by
local bodies.

In spite of the wide terms of sect. 107 of the Public Health Act, 1875, which gives the local body power to "cause any proceedings to be taken against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance" under the Act, it has been held that such proceedings must be ordinary proceedings known to the law, and that accordingly, in the absence of special damage, a local authority cannot sue in respect of a public nuisance, except with the sanction of the Attorney-General by action in the nature of an information (*q*). In like manner, a parish council cannot, except by proceedings in the nature of an information brought with the sanction of the Attorney-General, maintain an action to enforce the right of the parishioners to the use of a well or spring (*r*). As regards public rights of way, however, 56 & 57 Vict. c. 78, s. 26, sub-s. (3), gives express power to a district council to institute or defend legal proceedings.

Municipal Cor-
porations Act,
5 & 6 Will. 4,
c. 76.

The funds and property of all corporations which are within the Municipal Corporations Act, 1882, are impressed with the character of a trust. The corporation has been constituted by the Act a trustee for public purposes of the borough fund and property, and is as such subject to the jurisdiction of the Court (*s*). Although the Act contains provisions for correcting abuses in respect of the borough property, there is nothing to exclude the ordinary jurisdiction of the Court to prevent breach of trust (*t*). In *Attorney-General v. Corporation of Yarmouth* (*u*), a corporation was restrained from granting a lease at an undervalue and for a fine, contrary to the provisions of the 95th clause of the Municipal Corporations Act, 1885.

(*q*) *Wallasey Local Board v. Gracey*, 36 C. D. 593; *Tottenham Urban Council v. Williamson*, (1896) 2 Q. B. 353 (C. A.).

(*r*) *Stoke Parish Council v. Price*, (1899) 2 Ch. 277.

(*s*) See sects. 139, 140, and the fifth schedule to the Act.

(*t*) *Att.-Gen. v. Aspinall*, 2 M. & C. 613; *Att.-Gen. v. Wilson*, Cr. &

Ph. 22; *Parr v. Att.-Gen.* 8 Cl. & Fin. 431; *Att.-Gen. v. Corporation of Newcastle-upon-Tyne*, 23 Q. B. D. 492, 497; *Tynemouth Corporation v. Att.-Gen.*, (1899) A. C. pp. 305, 306; and see *Stevens v. Chown*, (1901) 1 Ch. 894, 895; *Att.-Gen. v. Ashborne Recreation Ground Co.*, (1903) 1 Ch. 101.

(*u*) 21 Beav. 625.

The Court has, it would appear, jurisdiction, upon a proper case being made out, to restrain a municipal corporation from making a rate (*x*); but the proper remedy is to apply to a Court of law, either to quash the rate under the provisions of the Act, or to apply by *certiorari* to the King's Bench Division under sect. 141 of the Act of 1882 (*y*).

Public bodies, incorporated by statute for a public purpose or the promotion of a public benefit, may not exceed the jurisdiction which has been entrusted to them by the legislature. So long as they strictly confine themselves within the limits of their jurisdiction, and proceed in the mode which the legislature has pointed out, the Court will not interfere to see whether any regulation or alteration which they make is good or bad; but if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and assume to themselves a power which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them as persons acting without legal authority (*z*).

Public bodies confined strictly within the limits of their powers.

Municipal corporations dealing with borough funds, and acting under a general or some local statute, and public bodies incorporated by statute for carrying into effect certain works, are bound to apply the corporate funds for the purposes directed, and in the mode pointed out, by the Act which gives them authority, and for no other purpose whatsoever (*a*). The application of the corporate funds to any other purpose than the proper purposes of the Act, however desirable it may be,

Misapplication of corporate funds.

(*x*) *Att.-Gen. v. Corporation of Lichfield*, 11 Beav. 121; *Att.-Gen. v. Mayor, &c., of Newcastle-upon-Tyne*, (1892) A. C. 568.

(*y*) 45 & 46 Vict. c. 50. See *Att.-Gen. v. Mayor, &c., of Wigan*, Kay, 268.

(*z*) *Frewin v. Lewis*, 4 M. & C. 254. See *Tinkler v. Wandsworth District Board of Works*, 2 D. & J. 261; *Att.-Gen. v. Rathmines Commissioners*, 5 L. R. Ir. 114; *London County Council v. Att.-Gen.*, (1902)

A. C. 165. See, as to injunctions against trespass and nuisance by public bodies, *ante*, pp. 85 *et seq.*, and pp. 126 *et seq.*

(*a*) *Att.-Gen. v. Mayor of Wigan*, Kay, 268, 5 D. M. & G. 54; *Att.-Gen. v. Mayor, &c., of Bailey*, 26 L. T. N. S. 392, W. N. (1872) 74; *Reg. v. Mayor, &c., of Tamworth*, W. N. (1868) 289; *Reg. v. Mayor, &c., of Exeter*, 6 Q. B. D. 135; *Leith Council v. Leith Harbour Commissioners*, (1899) A. C. 508.

Chap. XX. is improper, and will be restrained by injunction (b). Where a corporate body, without having authority so to do, has promoted a bill in Parliament for the purpose of obtaining increased powers, and such bill has been rejected, an injunction has been granted to restrain the corporation from discharging the expenses of the application to Parliament out of the corporate funds (c). So also commissioners under a local Act for draining and lighting a town, "with powers to pay all costs incident to the purposes of the Act and to carry the intents and purposes of the Act into full and complete execution in other respects," were restrained from applying any part of the rates raised under the Act in paying the expenses of an application to Parliament (d). A corporation, however, is justified in applying the corporate funds in the payment of expenses incurred in opposing a bill in Parliament which would, if sanctioned, be injurious to the property of the corporation (e). The Municipal Corporations (Borough Funds) Act, 1872 (f), empowers municipal bodies to apply the public funds or rates in promoting or opposing bills in Parliament, but subject nevertheless to the restrictions therein mentioned. It seems, however, that, independently of this Act, a municipal corporation has the right to defray out of the borough funds or rates the expenses of resisting an attack made by bill in Parliament against the existence of the corporation, or against its property, or against its rights, powers, or privileges (g). In a case where a municipal corporation, without having complied

Expenses of promoting or opposing bills in Parliament.

(b) *Att.-Gen. v. Mayor of Wigan*, Kay, 274; *Att.-Gen. v. Mayor of Swansea*, (1898) 1 Ch. 602; *Att.-Gen. v. Mayor of Tynemouth*, (1898) 1 Q. B. 605; (1899) A. C. 293; *Att.-Gen. v. London County Council*, (1901) 1 Ch. 781, (1902) A. C. 165.

(c) *Att.-Gen. v. Corporation of Norwich*, 16 Sim. 225, *affd.* 21 L. J. Ch. 139; *Att.-Gen. v. Guardians of Poor of Southampton*, 17 Sim. 6.

(d) *Att.-Gen. v. Andrews*, 2 Mac. & G. 223; *Att.-Gen. v. West Hartlepool, &c., Commissioners*, 10 Eq.

152. See, as to form of order where members of a board have applied the produce of rates to an illegal purpose, *Att.-Gen. v. Tottenham Local Board*, W. N. (1872) 205.

(e) *Att.-Gen. v. Andrews*, 2 Mac. & G. 223; *Att.-Gen. v. Mayor of Wigan*, 5 D. M. & G. 54; *Att.-Gen. v. Mayor, &c., of St. Helen's*, W. N. (1870) 150.

(f) 35 & 36 Vict. c. 91, ss. 2 and 4.

(g) *Att.-Gen. v. Mayor of Brecon*, 10 C. D. 204.

with the requirements of sect. 4 of the Borough Funds Act, 1872, opposed a bill in Parliament promoted by a local gas company, their opposition being directed against certain clauses in the bill affecting the price of gas to be paid by consumers, the corporation being large consumers of gas for public lighting and other purposes, it was held that the bill was not an attack upon the property, rights, duties or privileges of the corporation, within the principle of *Attorney-General v. Mayor of Brecon* (*h*), and an injunction was accordingly granted to restrain the corporation from applying any part of the borough fund (there being no surplus) in paying the expenses of opposing the bill (*i*). In like manner, a municipal corporation cannot, where there is no surplus, legally pay out of the borough funds the costs incurred by the chief constable in opposing, by direction of the council, appeals against the refusal of justices to renew the licenses of publicans; and it seems that even if there had been a surplus of the borough fund, the same could not have been so applied (*k*).

In a recent case, the magistrates and council of Leith, who were also the local authority for public health, had incurred costs in opposing in Parliament a bill promoted by the municipal corporation of the city of Edinburgh, the main object of the bill being to extend the boundaries and jurisdiction of that city by amalgamating with it the burghs of Leith and Portobello. The opposition to the bill was successful, and the only question was, in effect, out of which of two funds under the control of the Leith corporation the expenses of opposing the bill should come. It was held that the expenses could not be included in the assessment levied under the Public Health (Scotland) Act, 1867, as "expenses incurred in executing that Act" (*l*).

In *Attorney-General v. Vestry of Bermondsey* (*m*) a vestry

(*h*) 10 C. D. 204.

(*i*) *Att.-Gen. v. Mayor of Swansea*, (1898) 1 Ch. 602; and see *Att.-Gen. v. Rickmanworth Urban Council*, 86 L. T. 521.

(*k*) *Att.-Gen. v. Mayor of Tyne-mouth*, (1893) 1 Q. B. 604; (1899)

A. C. 293.

(*l*) *Leith Council v. Leith Harbour Commissioners*, (1899) A. C. 508.

(*m*) 23 C. D. 60. See also *Rex v. Dolby*, 87 L. T. 27, where the West Ham District Council having purchased an omnibus for the purpose

Chap. XX.

incorporated under the Metropolitan Local Management Act, 1855 (n), was restrained from applying the rates in paying the expenses of a dinner or a ball or other ceremonies in connection with the opening of a new vestry hall. So also a vestry within the metropolis was restrained from applying monies levied by rates to the expense of promoting a bill in Parliament (o). So also, where a vestry authorised by Act of Parliament to levy rates for certain purposes had mixed the monies arising from distinct rates into one fund for the purpose of meeting the general expenditure of the parish, the Court restrained them from applying any portion of one class of rates and receipts in supplying the deficiencies in any other class of rates, and generally from applying the monies received by them for any other purposes than those for which they were authorised by the Act to be collected (p).

Where a body of persons are by statute constituted trustees for certain public purposes, and powers are conferred on them to levy rates upon the district to a certain limited amount, they are authorised (if not expressly prohibited) to apply the rates of any one year in the payment of debts properly incurred in a previous year in the execution of those trusts. It is otherwise, however, if the power of rating be unlimited in amount. Where one of the purposes of the trust is such that it can only be properly carried out by raising a sum of money larger than the current rates can supply, the trustees are justified in raising this sum by way of loan, and paying the same with interest out of the future rates (q).

Injunctions
relating to poor
law relief.

The Court has jurisdiction to grant an injunction restraining poor law guardians from applying rates in the relief of able-bodied men who, in consequence of a strike, refuse to accept

of conveying the members of the council about the district when performing their ordinary duties, expended certain moneys in repairing the omnibus, which the auditor disallowed. It was held that the surcharge by the auditor was right.

(n) 18 & 19 Vict. c. 120.

(o) *Att.-Gen. v. Lambeth Vestry*, W. N. (1888) 19, 4 Times Rep. 257.

(p) *Att.-Gen. v. Daniel*, 9 L. J. Ch. N. S. 394; and see *Att.-Gen. v. Corporation of Thetford*, 8 W. R. 467.

(q) *Att.-Gen. v. Church*, 2 H. & M. 697.

work which they might obtain (r). But having regard to the wide powers vested in the Local Government Board of remitting, *i.e.*, authorising the allowance of expenses which have been properly disallowed in the audit of the poor law accounts, the Court ought to be "very careful in granting injunctions relating to poor law relief" (s).

Delay in making the application to restrain a corporation from applying the corporate funds to other purposes than the proper purposes of the Act is not in most cases material (t).

Eleemosynary corporations, or corporations for charitable purposes, are subject to the rules, laws, statutes, and ordinances ordained by the founder or the visitor whom he has appointed (u). To all eleemosynary corporations the right of visitation is incident. Where the King is founder, the King and his successors are the visitors: if a private person has been the founder, his heirs and assigns are the visitors. If the heirs of a founder fail, and no visitor has been appointed, the right of visitation devolves on the Crown, and is exercised on behalf of the Crown by the Court of Chancery (x). The visitor has an exclusive jurisdiction over all matters which come within the scope of his authority (y). Whatever relates to the internal management and regulation of the charity rests within the exclusive jurisdiction of the visitor. The decisions of the visitor, so long as he keeps within his jurisdiction, are final, and not examinable at law (z) or in equity (a). If the visitor has not acted, or has declined to act in a case where he ought to act, or is about to interfere in a case where he

(r) *Att.-Gen. v. Merthyr Tydfil Union*, (1900) 1 Ch. 516, 546, 550 (C. A.).

(s) (1900) 1 Ch. p. 546, *per* Lindley, M. R.

(t) *Att.-Gen. v. Eastlake*, 11 Ha. 205, 228; *Att.-Gen. v. Mayor, &c., of Plymouth*, 1 W. R. 443; and see *Islington Vestry v. Hornsey Urban Council*, (1900) 1 Ch. 695, 705, 706.

(u) *Philipps v. Bury*, 2 T. R. 346, 1 Lord Raym. 5.

(x) *Eden v. Foster*, 2 P. Wms.

326; *Att.-Gen. v. Gaunt*, 3 Sw. 148; *R. v. Catherine Hall*, 4 T. R. 239.

(y) *King v. Bishop of Ely*, 2 T. R. 290; *Green v. Rutherford*, 1 Ves. 462.

(z) *Philipps v. Bury*, 2 T. R. 346; *St. John's College v. Toddington*, 1 Burr. 200.

(a) *Att.-Gen. v. Smythies*, 2 M. & C. 135; *Thompson v. University of London*, 33 L. J. Ch. 625.

Chap. XX.

has no jurisdiction, application must be made to the Court of King's Bench for a *mandamus* or a prohibition, as the case may be, and not to a Court of equity (*b*). The Court has no jurisdiction to interfere with the visitorial power, unless it finds a breach of trust (*c*): but where there is a breach of trust the Court will interfere to see the trusts properly performed, notwithstanding there may be a general or a special visitor (*d*). Thus, where a French Protestant Church had been established by letters patent from the Crown, and the governing body had, apart from the charter of incorporation, funds impressed with a trust in favour of the pastor, who, when elected, was presented, approved, and instituted by the Crown, the Court, notwithstanding the visitorship of the Crown, restrained the governing body from hindering the pastor in the duties of his office (*e*). Where the duties of the visitor are not confined to overlooking the character of the institution, but extend to the management of the property, he is, so far as there is a trust, subject to the jurisdiction of the Court (*f*).

Eleemosynary corporations include hospitals, colleges, or free grammar schools incorporated for the teaching of children (*g*). Protestant dissenting chapels, incorporated by charter or letters patent for religious purposes, may be also classed under this head (*h*).

Trustees of a charity, whether they be a corporation or individuals, having in their hands funds devoted to certain charitable purposes, must devote the funds of the charity to those purposes. The application of the funds to other than such purposes is a breach of trust, and will be restrained (*i*).

(*b*) *Whiston v. Dean and Chapter of Rochester*, 7 Ha. 532. 165; *Att.-Gen. v. Smythies*, 2 M. & C. 135.

(*c*) *Att.-Gen. v. Foundling Hospital*, 2 Ves. J. 43; *Re Berkhamstead School*, 2 V. & B. 134; *Thompson v. University of London*, 33 L. J. Ch. 625. (*g*) *Att.-Gen. v. Price*, 3 Atk. 108; *Att.-Gen. v. Brazenose College*, 2 Cl. & Fin. 296.

(*d*) *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435. (*h*) *Att.-Gen. v. Cock*, 2 Ves. 273; *Att.-Gen. v. Fowler*, 15 Ves. 85; *Daugars v. Rivaz*, 28 Beav. 233.

(*e*) *Daugars v. Rivaz*, 28 Beav. 233. (*i*) *Att.-Gen. v. Compton*, 1 Y. & C. C. C. 417; *Att.-Gen. v. Corporation of Newbury*, C. P. C. 72;

(*f*) *Att.-Gen. v. Lock*, 3 Atk.

Where, however, an action relating to a charity involves, even Chap. XX.
if it be only in part, the administration of the trusts of the charity, the leave of the Charity Commissioners must be obtained under sect. 17 of the Charitable Trusts Act, 1853, to the institution of the proceedings (*k*).

The visitor of a spiritual or ecclesiastical corporation has the same exclusive right over all matters which come within the scope of his authority as the visitor of an eleemosynary one (*l*). The Court of Chancery has no jurisdiction over the visitorial power unless it finds a trust (*m*); but where there is a trust the Court will interfere to see the trust properly performed, notwithstanding there may be a visitor (*n*). The relationship in the ordinary sense of trustee and *cestui que trust* does not exist between the dean and chapter of a cathedral and the head master of a grammar school attached to it, where both the cathedral and the school are governed by the statutes of the founder, and are subject to the jurisdiction of a special visitor, and where the head master is paid out of the common fund of the endowment. Where, accordingly, the Dean and Chapter of Rochester, in exercise of a power vested in them by the statutes of their founder, summarily dismissed the head master of the grammar school attached to the cathedral from his office without hearing him in his defence, the Court refused to interfere by injunction either *durante lite*, or otherwise, to restrain the dean and chapter from removing him from his office, or from appointing another head master in his stead (*o*).

Pending a suit respecting the right of nomination to a benefice, a bishop will be restrained from taking advantage of the lapse and exercising the presentation (*p*). So also, where an improper appointment has been made of a chaplain

Att.-Gen. v. Sherborne School, 18 *Beav.* 256. *of Rochester*, 7 *Ha.* 532.

(*k*) See *Rooke v. Dawson*, (1895) 1 *Ch.* 480; and see *Rendall v. Blair*, 45 *C. D.* 139, 151 (*C. A.*). (*n*) *Att.-Gen. v. St. Cross Hospital*, 17 *Beav.* 435.

(*l*) *Reg. v. Dean and Chapter of Chester*, 15 *Q. B.* 513; *Reg. v. Dean and Chapter of Rochester*, 17 *Q. B.* 1. (*o*) *Whiston v. Dean and Chapter of Rochester*, 7 *Ha.* 532.

(*p*) *Edenborough v. Archbishop of Canterbury*, 2 *Russ.* 93; *Att.-Gen. v. Cuming*, 2 *Y. & C. C. C.* 139; *Nicholson v. Knapp*, 9 *Sim.* 326.

Chap. XX. or vicar by persons in whom the power of appointment is vested, the Court will restrain a bishop from instituting the person so appointed (*q*). So also, the Court will, in a proper case, restrain a bishop and churchwardens from interfering with a vicar in the enjoyment of his benefice (*r*).

(*q*) *Att.-Gen. v. Bishop of Lich-* (*r*) *Sweet v. Bishop of Ely*, (1902)
field, 5 Ves. 825; *Att.-Gen. v. Earl* 2 Ch. 508, 516.
of Powis, Kay, 186.

CHAPTER XXI.

ORDERS RESTRAINING PROCEEDINGS.

UNDER the former procedure the Court of Chancery had jurisdiction to restrain by injunction an action at law in all cases where the defendant to the action could show that he had a good equitable defence. But this jurisdiction has been abolished by the Judicature Act, 1873, by which it is enacted that no cause or proceeding pending in the High Court of Justice, or in the Court of Appeal, shall be restrained by injunction or prohibition, but that every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained under the former procedure may be relied on by way of defence thereto (a).

Chap. XXI.
Judicature Act,
1873, s. 24,
sub-s. 5.

This enactment only applies where a proceeding is "pending"; and accordingly there is jurisdiction to restrain by injunction the institution of proceedings in the High Court (b).

The above enactment contains a proviso to the effect that nothing in the Act is to disable either the High Court or the Court of Appeal from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit, upon application made to it in a summary way.

Order 25, r. 4, provides that any pleading may be struck out on the ground that it discloses no reasonable cause of action or answer; and in such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the action may be stayed or dismissed, or judgment entered, as may be just. Independently of this rule, every Court of

Frivolous and
vexatious
actions.

(a) 36 & 37 Vict. c. 66, s. 24, sub-s. 5; *Garbutt v. Faucus*, 1 C. D. 155.

and see *Cercle Restaurant, &c., Co. v. Lavery*, 18 C. D. 555; *In re A Company*, (1894) 2 Ch. 349.

(b) *Besant v. Wood*, 12 C. D. 630;

Chap. XXI.

justice has an inherent jurisdiction to protect itself from abuse of its own procedure, and to stay proceedings which are manifestly frivolous and vexatious (c). When an application is made under Order 25, r. 4, the Court does not look outside the pleadings (d), but when the application is under the inherent jurisdiction of the Court, affidavit evidence is admissible (e).

By the Vexatious Actions Act, 1896, it is provided that the Attorney-General may apply for an order under the Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains leave of the High Court or some Judge thereof, and satisfies the Court or Judge that there is *prima facie* ground for such proceeding (f).

Injunction to
restrain pro-
ceedings in
inferior Courts.

The Court of Chancery had jurisdiction to restrain by injunction proceedings in the County Courts (g), the Lord Mayor's Court (h), and in tribunals constituted for a special purpose (i). This jurisdiction has not been affected by the Judicature Acts, and may, accordingly, on a proper case being made out, be exercised by the High Court.

The principles on which the Court of Chancery interfered with proceedings in these Courts were the same as those upon which it interfered with proceedings before Courts of law. If the question was one which might be more satisfactorily and more

(c) *Metropolitan Bank v. Pooley*,
10 A. C. 210, 214; *Reichel v.*
Magrath, 14 A. C. 665.

(d) *Republic of Peru v. Peruvian*
Guano Co., 36 C. D. 489.

(e) *Remmington v. Scoles*, (1897)
2 Ch. 1 (C. A.); and see *Lawrance*
v. Lord Norreys, 39 C. D. 213, 15
A. C. 214.

(f) 59 & 60 Vict. c. 51.

(g) *Rutcliff v. Winch*, 16 Beav.
576.

(h) *Sieveling v. Behrens*, 2 M. &
C. 581; *Cotesworth v. Stephens*, 4 Ha.
194.

(i) *Earl Beauchamp v. Darby*,
W. N. (1866) 308.

completely settled in equity than by the Court in which proceedings were taken or instituted, the Court of Chancery would interfere by injunction, and draw the matter within its own jurisdiction. If, on the other hand, the power of the Court in which proceedings were taken or instituted was sufficient and adequate for the purposes of justice, the proceedings were allowed to take their course. The Court would not interfere with proceedings in these Courts, unless to do so would be a sound exercise of its discretion. It was not necessary, to induce the Court to interfere with the proceedings in these Courts, that it should find a case which would entitle the plaintiff to relief at all events. It was sufficient if the Court found upon the pleadings and upon the evidence a case which made the transaction a proper subject of investigation in a Court of equity (*k*).

Parties, accordingly, were, under the circumstances of the case, restrained after a commission in bankruptcy from taking proceedings in foreign attachment in the Lord Mayor's Court (*l*). So also, proceedings in foreign attachment in the same Court were restrained on the ground that the matter could be more satisfactorily and expeditiously settled in the Court of Chancery (*m*). So also, a creditor of an intestate was restrained from taking proceedings in the Lord Mayor's Court after a decree for administration (*n*).

But where, previously to an administration order in a creditor's action, another creditor had obtained judgment in the County Court against the executor, the Court would not restrain the judgment creditor from pursuing his remedy in the County Court against the executor personally (*o*).

Where the Legislature has constituted a tribunal for a special purpose, the Court of Chancery would not prevent

(*k*) *Glascott v. Lang*, 3 M. & C. 451, 455; *Fletcher v. Rodgers*, 27 W. R. 97; *Re Original Hartlepool Colliery Co.*, 51 L. J. Ch. 508.

(*l*) *Barker v. Goodair*, 11 Ves. 78. See *Pennell v. Roy*, 3 D. M. & G. 137.

(*m*) *Cotesworth v. Stephens*, 4 Ha. 185, 194. See *Anderson v. Kemshead*, 16 Beav. 329.

(*n*) *Redhead v. Welton*, 30 L. J. Ch. 577.

(*o*) *Re Womersley*, 29 C. D. 557.

Chap. XXI.

persons who were entitled to do so from applying to that tribunal (*p*). No equity could be founded on an allegation that a Court, legally constituted, was not properly competent to decide questions within its jurisdiction (*q*). But if a case of fraud could be shown, the Court might entertain jurisdiction (*r*).

In *Dyke v. Stephens* (*s*), the Court restrained a man who had submitted to the jurisdiction from instituting proceedings in respect of the same subject-matter in the Chancery Court of Lancaster.

Concurrent
administration
actions in High
Court.

Where concurrent actions for administration of the same estate are pending before different Judges of the Chancery Division, as a general rule, the action in which judgment has been first obtained will be allowed to proceed, and the other actions will be stayed (*t*).

Injunctions to
restrain pro-
ceedings in
foreign Courts.

The High Court of Justice has clear and undoubted jurisdiction on a proper case being made out to restrain persons within its jurisdiction from prosecuting suits in the Courts of foreign countries (*u*). In the exercise of the jurisdiction the Court does not proceed upon any claim of right to interfere with or control the course of proceedings in the tribunals of a foreign country, or to prevent them from adjudicating on the right of parties when drawn in controversy, and duly presented for their determination. The jurisdiction is founded on the authority vested in Courts of equity over persons within the limits of their jurisdiction, and amenable to process to restrain them from doing acts which work wrong and injury to others, and are therefore contrary to equity and good conscience. As the order of the Court in such cases is pointed solely at the individual, and does not extend to the tribunal where the suit or proceeding is pending, it is immaterial that

(*p*) *Harris v. Jose*, 14 W. B. 682.
303.

(*q*) *Burnsley Canal Co. v. Twibell*,
7 Beav. 19. See *Bateman v. Boynton*,
1 Ch. 359.

(*r*) See *Earl Beauchamp v. Darby*,
W. N. (1866) 308.

(*s*) W. N. (1885) 177, 29 Sol. J.

(*t*) *Harris v. Gandy*, 1 De G. F.
& J. 13; *In re Swire*, 21 C. D. 647
(C. A.).

(*u*) See *McHenry v. Lewis*, 22
C. D. 397 (C. A.); *Armstrong v.*
Armstrong, (1892) P. 98.

the party to whom it is addressed is prosecuting his action in the Courts of a foreign country (*x*). Chap. XXI.

It seems that if the circumstances of the case are such as would have made it the duty of the Court of Chancery under the former procedure to restrain a party from instituting or carrying on proceedings in a Court here, they will warrant the High Court of Justice in restraining proceedings in a foreign country (*y*). In *Lord Portarlington v. Soulby* (*z*), the indorsee of a bill of exchange was restrained from suing the plaintiff in the Irish Courts upon the bill upon certain equitable grounds which would (under the then procedure) have warranted a similar injunction against any action in the Courts of this country.

Upon the same principle the rule which prevented a creditor from proceeding with an action at law for the recovery of his debt after a decree in an administration or creditor's suit, is applicable to the case of a creditor proceeding in a foreign Court (*a*). If after a decree for administration, under which he may come in and prove his debt and have complete relief, a creditor within the jurisdiction instituted proceedings abroad in respect of the same matter, the Court of Chancery considered that act as a vexatious harassing of the opposing party, and restrained the foreign proceedings (*b*). Thus, in *Beauchamp v. Lord Huntley* (*c*), a creditor who had come in under a decree and got relief against the English assets, was restrained from further prosecuting a suit in relation to the same estate in Ireland. So also in *Graham v. Maxwell* (*d*), a creditor who had come in here under a decree in an administration suit was restrained from proceeding with an action in Scotland which he had commenced in ignorance of the decree (*e*). The Court may, however, under the peculiar

- | | |
|--|---|
| (<i>x</i>) <i>Lord Portarlington v. Soulby</i> ,
3 M. & K. 108; <i>Carron Iron Co. v.</i>
<i>Maclaren</i> , 5 H. L. C. 416, 436, <i>per</i>
Lord Cranworth. | 211; <i>In re Low</i> , (1894) 1 Ch. 147,
156 (C. A.).
(<i>b</i>) 5 H. L. C. 437, <i>per</i> Lord
Cranworth. |
| (<i>y</i>) See 5 H. L. C. p. 439. | (<i>c</i>) Jac. 546. |
| (<i>z</i>) 3 M. & K. 104. | (<i>d</i>) 1 Mac. & G. 71. |
| (<i>a</i>) <i>Graham v. Maxwell</i> , 1 Mac. &
G. 71; <i>Eustace v. Lloyd</i> , 25 W. R. | (<i>e</i>) 5 H. L. C. 455, <i>per</i> Lord St.
Leonards. See, as to the costs, |

Chap. XXI.

Proceedings in
different Courts
claiming same
relief.

circumstances of the case, decline to exercise the jurisdiction, although the person whose proceedings are sought to be restrained has appeared and put in an answer (*f*).

Where a plaintiff sues a defendant for the same object in two Courts in this country, such a proceeding is *primâ facie* vexatious, and the plaintiff will, as a general rule, be put to his election as to which action shall be stayed and which proceeded with. The same rule applies where one of the actions is in this country and the other action is in the King's Courts in Scotland or Ireland, or any other part of the King's dominions (*g*). But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must therefore be made out to induce the Court here to interfere by injunction (*h*). It is not vexatious for a plaintiff to bring an action against a defendant relating to the same subject-matter in two different countries "where there are substantial reasons of benefit to the plaintiff" in doing so (*i*).

In *Harrison v. Gurney* (*k*), a decree had been obtained for the execution of the trusts of a deed for the benefit of creditors, and a receiver of real estates in England and Ireland had been appointed. Some of the trustees afterwards filed a bill in Ireland for executing the trusts of the same deed. Lord Eldon restrained them from prosecuting that suit, on the ground that it sought the same relief as might be had under the decree obtained in this country. So also, in *Beckford v. Kemble* (*l*), after a decree in this country for an account on a bill to redeem a West India mortgage, Sir John Leach would not suffer the mortgagee to prosecute a suit in Jamaica for foreclosing the same mortgage, on the ground that full relief

Graham v. Maxwell, 1 Mac. & G. 71.

(*f*) *Stainton v. Carron Iron Co.*, 21 Beav. 159, 161.

(*g*) *McHenry v. Lewis*, 22 C. D. 397 (C. A.).

(*h*) *McHenry v. Lewis*, 22 C. D.

397 (C. A.); *Peruvian Guano Co. v. Bockwoldt*, 23 C. D. 225 (C. A.).

(*i*) 23 C. D. p. 230, *per Jessel*, M. R.

(*k*) 2 J. & W. 563.

(*l*) 1 Sim. & St. 7.

might be had under the decree in this country (*m*). So also, in *Booth v. Leycester* (*n*), a person was restrained from prosecuting a suit in Ireland after a decree in this country, the subject-matter of the suit being the same as that already adjudicated on in the Court here. So also in *Wedderburn v. Wedderburn* (*o*), where parties who had in a suit here established their right against the defendant, instituted proceedings in Scotland against some of the defendants for the same demand, an injunction was obtained at the Rolls against their proceedings in Scotland, and Lord Cottenham confirmed the order (*p*).

Even though no decree has been obtained in this country, yet if a suit instituted abroad does not appear so well calculated to answer the ends of justice as the suit here, the Court will restrain the foreign action, imposing, however, terms which it considers reasonable for protecting the party whom it enjoins. Thus in *Bushby v. Munday* (*q*), Bushby had given a bond to Munday to secure a gambling debt, and Munday assigned the bond to Clowes. Clowes proceeded in Scotland against Bushby, who was a Scotchman, and a proprietor of real estate. Bushby filed a bill here to have the bond set aside and delivered up. Upon a motion for an injunction to stay the proceedings in Scotland, Sir J. Leach granted the injunction, because he considered the validity of the bond could be better tried in the country where the Courts judicially knew the law applicable than in Scotland, where the Courts could only learn the law as a matter of fact to be communicated by way of evidence; and, secondly, that the remedy here, if the obligor should make out his title, would be more complete than could be had in Scotland. He laid it down generally that where parties, defendants, are resident in England, and brought here by subpoena, this Court has jurisdiction to act upon them personally with respect to the objects of the suit, as the ends of justice require, and with that view to order them to take or

(*m*) See *Maclaren v. Stainton*, 26 L. J. Ch. 332.

(*n*) 1 Keen, 579.

(*o*) 2 Beav. 208, 4 M. & C. 585.

(*p*) Per Lord St. Leonards, 5 H. L. 454.

(*q*) 5 Madd. 297.

Chap. XXI.

to omit to take any steps or proceedings in any other Court of justice, whether in this or in a foreign country (*r*). The Vice-Chancellor, therefore, restrained the assignee from going on with the Scotch action, putting the plaintiff on such terms in Scotland as would secure to him the preferable lien which he might acquire by his suit on the bond there, if he should ultimately establish any demand on the bond (*s*).

So also, where an order had been made for winding up a company, the Court, on the application of the liquidator, restrained creditors in Scotland from proceeding with an action in Scotland against the company, on the ground that the matter could be better investigated here. The Court, it was said, would take care that the Scotch creditors should not lose any priority they might have (*t*). So also in *Bunbury v. Bunbury* (*u*), Lord Cottenham, affirming a judgment of Lord Langdale (*x*), restrained parties from prosecuting proceedings at law in Demerara to recover real estates there, which involved questions depending on the law of Holland, and also on the law of England, and further questions of account which could only be taken in this country. Lord Cottenham laid it down as a principle that where part of the subject-matter is admitted to be necessarily within the jurisdiction, the Court will take upon itself to determine the whole matter, though it involves questions of foreign law, more especially where the question of foreign law depends to some extent upon the determination of the Court as to the English law. Upon granting the injunction, his Lordship put the plaintiff on terms to submit and carry into effect any order which the Court might think fit to make in respect of the proceedings in Demerara. So also in *Hope v. Carnegie* (*y*), the Court, after decree for administration, restrained one of the parties

(*r*) 5 Mad. p. 307. See also *re Wanzer, Ltd.*, (1891) 1 Ch. 305. *Carron Iron Co. v. Maclaren*, 5 H. L. C. pp. 452, 453. Cf. *In re Thurso Gas Co.*, 42 C. D. 486.

(*s*) See *Carron Iron Co. v. Maclaren*, 5 H. L. C. pp. 438—446, 453.

(*t*) *Re Queensland Mercantile Agency Co.*, W. N. (1888) 62; *In*

(*u*) 3 Jur. 644.

(*x*) *Ib.*; 1 Beav. 335.

(*y*) 1 Ch. 320.

interested from prosecuting proceedings in a foreign country Chap. XXI.
in regard to real and personal estate situate there.

If, however, from any cause it appears likely to be more Balance of convenience and inconvenience.
conducive to substantial justice, or if upon the balance of convenience and inconvenience it appears desirable that the foreign proceedings should be allowed to take their course, the Court will allow them to proceed (z). If the proceedings in the foreign country are calculated to give a security against the property there, so as to answer the demand under the decree here (a), or are necessary in order to protect the property there against the demands of creditors who have not appeared to the suit here, and are not within the jurisdiction (b), they will to this extent be allowed to be continued. In *Harrison v. Gurney* (c), Lord Eldon restrained a suit for administration in Ireland on the ground that the same relief was sought as could be had under the decree obtained in this Court, but he would not prevent a bill from being filed in Ireland for the mere purpose of calling on a receiver there to account for his receipts and payments (d). In *Jones v. Geddes* (e), where the Vice-Chancellor had granted an injunction against a heritable bond creditor, who was proceeding in Scotland against the assignees in bankruptcy of the obligor, who had real estate in Scotland, Lord Lyndhurst dissolved the injunction upon a simple consideration of the convenience and inconvenience of the different courses to be adopted (f). In *Hyman v. Helm* (g), the Court would not restrain the defendant to an action from suing in a foreign country in respect of the same subject-matter during the pendency of the action in England in which the matters in dispute could be determined, there being no

(z) See *Wright v. Simpson*, 6 Ves. 730; *Pennell v. Roy*, 3 D. M. & G. 140; *Transatlantic Co. v. Pietroni*, John. 604; *Dawkins v. Simonetti*, 29 W. R. 228, W. N. (1880) 201; *Moor v. Anglo-Italian Bank*, 10 C. D. 681; *McHenry v. Lewis*, 22 C. D. 397 (C. A.).

(a) *Wedderburn v. Wedderburn*, 2 Beav. 208, 4 M. & C. 585; *Carron*

Iron Co. v. MacLaren, 5 H. L. 454.

(b) *Parnell v. Parnell*, 7 Ir. Ch. 322.

(c) 2 J. & W. 563.

(d) *Per* Lord Cranworth, 5 H. L. 437.

(e) 1 Ph. 724.

(f) *Per* Lord St. Leonards, 4 H. L. 454.

(g) 24 C. D. 531.

Chap. XXI.

evidence to show that the conduct of the defendant was vexatious, and it being possible that the course of procedure in the foreign Court might be such as to give an advantage to the defendant, of which he was entitled to avail himself.

In re Maudslay, Sons and Field (h) raised the question as to the right of an English creditor of an English company to take proceedings in a foreign country to attach a foreign debt owing to the company, notwithstanding the fact that the foreign debt was included in the debentures issued by the company, and a receiver had been appointed on behalf of the debenture-holders. In this case a receiver had been appointed in October, 1899, in a debenture-holders' action, of the undertaking and assets of the company, and among the assets was a debt due to the company from a French firm. In November, 1899, P. & Co., an English firm, who were creditors of the company, took proceedings in France for the purpose of attaching the debt due to the company from the French firm, and the plaintiffs in the debenture-holders' action thereupon applied for an injunction to restrain P. & Co. from intercepting or attaching, or attempting to obtain payment of the moneys due from the French firm. It was held that the charge created by the debentures did not entitle the debenture-holders to prevent P. & Co. from enforcing any rights given them by French law over the debt in question, which must be regarded as a French asset of the company, and that the attachment, which alone was recognised by the law of France, ought to prevail over the title of the debenture-holders.

Limits of the jurisdiction to restrain actions and suits in other countries.

The jurisdiction of the Court in restraining proceedings in foreign Courts, is in general limited to the case of persons who are within the power or the reach of the Court. The Court will not, unless under very special circumstances, interfere with the right of a foreigner resident abroad, who has not sought relief under a decree, or appeared in a suit here, to recover his debt according to the laws of his own country. The circumstance that a foreigner resident abroad may have

(h) (1900) 1 Ch. 602.

property within this country, or may have a house of agency here, does not give the Court jurisdiction (i). There may be cases in which the Court will restrain a foreigner domiciled in another country from proceeding to obtain payment of debts according to the law of the country in which he is domiciled, but a very strong case must be made out (k). In interfering to restrain actions prosecuted in other countries, the Court will be very cautious as to extending its jurisdiction under the colour of carrying out its principles. Where the case made out is simply one of interference by a stranger (who is within the Court's jurisdiction) with the property of another, upon an assumption of right, in a mode which is warranted by the law of a foreign country, although it may not be warranted by English law, this constitutes no foundation for the interference of the Court (l). To do so would be to assume a jurisdiction to prescribe the Courts in which parties should bring their suits, without there being anything to affect the conscience of the parties, upon the simple ground that the suits were such as in the opinion of this Court ought not to be maintained, and thus to bring under the decision of the Court the question whether suits in other Courts could be maintained, a question which it is for those Courts and not for this Court to determine (m). Where, therefore, a debtor became bankrupt in England, having real estate in Scotland, a creditor who had not proved under the bankruptcy was not restrained from proceeding in an action against the assignees in Scotland for the purpose of recovering out of the real estate there an amount equal to the dividend, which would have been payable on the debt (n).

In *Wallace v. Campbell* (o), the Court would not restrain the agent of the administratrix in England from sending over money of the intestate to Madeira, the intestate's estate being

(i) *Carron Iron Co. v. Maclaren*, 5 H. L. 416; *Sudlow v. Dutch-Rhenish Railway Co.*, 21 Beav. 43; *Re Boyse*, 15 C. D. 592.

(k) *Maclaren v. Stainton*, 26 L. J. Ch. 332.

(l) *Pennell v. Roy*, 3 D. M. & G. 126, 139.

(m) 3 D. M. & G. 139.

(n) *Pennell v. Roy*, 3 D. M. & G. 139.

(o) 4 Y. & C. 167.

Chap. XXI.

the subject of a suit in Madeira. "I must take for granted," said Lord Abinger, C. B., "that the Court in Madeira will do justice as well as the Court here" (p).

Proceedings
against company
in course of
winding up.

Under the Companies Act, 1862 (q), the Court has jurisdiction after a winding-up order has been made to restrain any suit, action, or other proceeding against the company in any part of the United Kingdom (r). The Court has also power under the Act, after a winding-up order has been made, to restrain a person within the jurisdiction from taking or continuing proceedings against the company abroad (s).

Proceedings by
incumbrancer
of company.

But an incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in course of winding up (t). So also, where, prior to the commencement of the winding up of an English company, a creditor had arrested property of the company in Scotland *jurisdictionis fundandæ causâ*, and had followed this up by bringing an action in Scotland and making an arrestment on the dependence of the action, it was held that he had become, subject to his obtaining a decree in such action, a secured creditor, and ought not to be restrained from continuing his action (u).

(p) 4 Y. & C. p. 168. See *Pennell v. Roy*, 3 D. M. & G. 140; *Fletcher v. Rodgers*, 27 W. R. 97; *Dawkins v. Simonetti*, 29 W. R. 228, W. N. (1880) 201.

(q) See sects. 87 and 122. See also sects. 85, 197, 198, 201, and 202.

(r) *In re International Pulp, &c.*, Co., 3 C. D. 594; *In re Hermann*

Loog, Ltd., 36 C. D. 502.

(s) *In re Oriental Inland Steam Co.*, 9 Ch. 557; *In re Central Sugar Factories of Brazil*, (1894) 1 Ch. 369.

(t) *Moor v. Anglo-Italian Bank*, 10 C. D. 681.

(u) *In re West Cumberland Iron and Steel Co.*, (1893) 1 Ch. 713.

CHAPTER XXII.

INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

THE Court will upon a sufficient case being made out Chap XXII.
 restrain an improper transfer of stock (a). When a transfer Injunctions to
 is about to be made to wrong persons through mistake, the restrain the
 Court will not grant an injunction *ex parte* against the defen- transfer of
 dant to restrain the transfer, unless the plaintiff swears that stock.
 he believes the defendant will avail himself of the error, and
 refuse to make a re-transfer (b).

The Bank of England is not bound to take notice of any trust affecting public stock standing in its books; all that it has to do is to look to the legal title, and therefore if the person having the legal title applies for a transfer to himself, the Bank must permit such transfer accordingly (c). The interest of any stockholder dying is transferable by his executors or administrators, notwithstanding any specific bequest thereof (d).

The Banks of England and Ireland respectively before allowing any transfer of stock may, if the circumstances of the case appear to them to make it expedient, require evidence of the title of any persons claiming a right to make the transfer (e).

An injunction may be had under 39 & 40 Geo. III., c. 36, Injunctions to
 to restrain the Bank of England from permitting the transfer restrain the
 of stock or paying dividends (f). It is not necessary, as a Bank from
permitting
transfer of stock,
shares, &c.

(a) See *Stead v. Clay*, 4 Russ. 3 Bro. C. C. 260, 5 Ves. 664;
 550; *Glasse v. Marshall*, 15 Sim. *Franklin v. Bank of England*, 1
 71; *Lord Chedworth v. Edwards*, Russ. 575.

8 Ves. 46; *Pennell v. Deffell*, 4 (d) 33 & 34 Vict. c. 71, s. 23.

D. M. & G. 390; *Goldsmith v.* (e) *Ib.* s. 24. See *Prosser v. Bank*
Russell, 5 D. M. & G. 547. *of England*, 13 Eq. 611.

(b) *Arkwright v. Gryles*, 13 L. J. (f) *Ross v. Sherer*, 5 Madd. 458,
 Ch. N. S. 303. 6 Madd. 1.

(c) *Bank of England v. Moffat*,

K.I.

Chap. XXII.

rule, to make the Bank a party (g). The application may be made upon notice, or *ex parte* on affidavit verifying the urgency of the case (h). If after giving notice to the Bank, the plaintiff does not apply for an injunction, or take further proceedings, the defendant may obtain an order that the Bank permit the transfer on a given day, unless in the meantime an injunction shall be granted (i).

By 5 Vict. c. 5, s. 4, the Court may upon motion or petition of the party interested, in a summary way without a writ of summons issued, restrain the Bank or any public company from permitting the transfer of stock in the public funds, or any stock or shares in any public company, standing in any names in their books, or from paying any dividends due or to become due thereon; and the order is to specify the amount of the stock or the particular shares, and the names in which the same may be standing (k).

The application may be made *ex parte* by motion or petition (l). The motion paper or petition should be entitled in the matter of the Act and of the person applying, and if the applicant is a trustee, the proceedings should be also entitled in the matter of the trust (m).

The order must be served on the Chief Accountant of the Bank of England, if that Corporation be restrained, or upon the Secretary or other proper officer of any other public company restrained by the order by delivery to the persons served of an office copy of the order (n).

The restraining order under the Act (o) is, it seems, only intended to be for *interim* purposes, namely, to protect the stock until the party claiming it should have an opportunity of asserting his rights by action in the ordinary way (p).

(g) 39 & 40 Geo. 3, c. 36.

(h) *Hammond v. Maundrell*, 6 Ves. 772 a. n.; *Doolittle v. Walton*, 2 Dick. 442.

(i) *Ross v. Sherer*, 5 Madd. 458, 6 Madd. 1.

(k) A Government annuity is within the clause: *Ex parte Watts*, W. N. (1871) 26, 19 W. R. 400.

See, as to form of order, 1 Set. 729.

(l) *Blakesley's Trusts*, 23 C. D. 549; *Re Pike*, W. N. (1902) 42.

(m) *Ib.*

(n) Dan. Ch. Pr. 1379.

(o) 5 Vict. c. 5.

(p) *Ex parte Hertford*, 1 Ha. 584, 590.

Any person interested may apply to discharge or vary the order (*q*) ; the application is made by motion with notice to the person by whom the order was obtained and should be supported by affidavit (*r*). On the hearing of the application the Court may discharge or vary the order and award such costs as to the Court may seem fit (*s*).

The transfer of stock or shares, or the payment of dividends thereon, could under the former procedure be restrained by writ of *distringas*, which under 5 Vict. c. 5, s. 5, could be issued against any public company, whether incorporated or not, in whose books any stock or shares might be standing in which or in the dividends of which the applicant claimed to be interested. But under the present procedure no writ of *distringas* is to be issued (*t*). Any person however claiming to be interested in any stock (*u*) standing in the books of a company may, on making an affidavit in the prescribed form (*x*), with such variations as circumstances may require, and on filing the same in the Central Office with a notice in or to the effect of the prescribed form (*y*), and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy of the affidavit and the duplicate notice on the company (*z*), and the service of the office copy of the affidavit and of the duplicate of the filed notice will have the same effect against the company as if a writ of *distringas* in respect of the stock had been issued under 5 Vict. c. 5, s. 5 (*a*).

There must be appended to the affidavit a note stating the person on whose behalf it is filed and to what address notices, if any, for that person are to be sent (*b*), and all such notices shall be deemed to have been duly sent, if sent through the post by a prepaid letter, directed to that person at the address

(*q*) 5 Vict. c. 5, s. 4.

(*r*) *Ex parte Amyot*, 1 Ph. 130 n. ;
Re Hertford, 1 Ha. 590.

(*s*) *Re Hertford*, 1 Ha. 584.

(*t*) Ord. XLVI. r. 2. Sect. 5 of
5 Vict. c. 5 has been repealed by the
Statute Law Revision Act, 1892.

(*u*) The word "stock" includes

shares, securities, and dividends
thereon; ib. r. 3.

(*x*) See as to form, Appendix B.,
No. 27.

(*y*) Ib. No. 22.

(*z*) Ord. XLVI. r. 4.

(*a*) Ib. r. 8.

(*b*) Ib. r. 5.

Chap. XXII.

so stated or at any substituted address, whether the person to whom the notice is sent is living or not (c).

If, while the notice is in force, the company on whom it has been served, receives from the person in whose name the stock is standing or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company is not by force or in consequence of the service of the notice, authorised without the order of the Court to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request (d). The company on receiving such a request should serve a written notice on the person on whose behalf the notice was given stating that an application has been made for the stock or dividends and that unless an action is brought and an injunction obtained and served on or before a specified day (usually within the eight days above mentioned) the notice will be no longer regarded. A motion having been in such a case made for an *ex parte* notice to restrain the bank from permitting the transfer or paying the dividends, it was held to be the proper course to grant an *interim* injunction over the next motion day and that notice of the order must be served on the legal owner of the stock (e).

A notice filed under the preceding provisions may be withdrawn at any time by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition or by summons at chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice (f). The costs of an application for an order for the cesser of the operation of the notice are in the discretion of the Court (g), and may be ordered to be paid by the person on whose

(c) *Ib.* r. 6. See as to proviso for alteration of address, *ib.* r. 7; and as to amending the description of stock referred to in the filed notice, see r. 11.

(d) *Ord.* XLVI. r. 10.

(e) *Re Blakesley's Trusts*, 23 C. D. 549.

(f) *Ord.* XLVI. r. 9.

(g) *Ord.* LXV. r. 1.

behalf the notice was given or by the person making the application (h). Chap. XXII.

Where monies or securities are standing in Court, a person interested therein may obtain a stop order, the effect of which is to prevent the payment or transfer of the same without notice to the applicant (i). Any person applying for a stop order is not required to serve the parties interested in such parts of the monies or securities as are not sought to be affected (k). Stop orders.

The Court will on a proper case being made, interfere to prevent a sale. Thus trustees have been, under the circumstances of the case, restrained from selling until it should have been ascertained what would be most for the benefit and welfare of the *cestuis que trustent* (l). So also where a vendor had power to sell, but it was questionable whether the sale was being made properly in pursuance of the power, the sale was stayed (m). So also where a foreign vessel was driven into Plymouth by stress of weather, Lord Eldon, at the instance of the supercargo and part owner, granted an injunction to prevent the master from selling the cargo (n). So also where the representatives of a mortgagor had obtained the mortgage deeds from the mortgagee by fraud, Lord Eldon granted an injunction to restrain the defendants from selling or mortgaging the estate (o). So also any vexatious alienations during the progress of a suit will be restrained (p). Injunctions against sale.

In an action by an equitable mortgagee for sale or foreclosure the Court granted an injunction to restrain the mortgagor from dealing with the legal estate, there being ground for believing that the mortgagor intended to part with the legal estate *pendente lite* (q).

(h) See *Re Cross*, 1 Dr. & Sm. 580.

(i) See Ord. XLVI. r. 12.

(k) *Ib.* r. 13.

(l) *Wiles v. Gresham*, L. & E. Rep. 1 Eq. 348; *Marshall v. Sladden*, 7 Ha. 428; 4 De G. & Sm. 468; and see *ante*, p. 456.

(m) *Hawes v. James*, 1 Wils. Ch. 2.

(n) *Delafield v. Guanabeus*, Dan. Ch. Pr. 1362, 7th ed.

(o) *Wallis v. Wallis*, *ib.*

(p) *Powell v. Wright*, 7 Beav. 444; *Beyfus v. Bullock*, 7 Eq. 391; *Hart v. Herwig*, 8 Ch. 860; *Lempriere v. Lange*, 12 C. D. 675. After an order for foreclosure *nisi*, the mortgagee cannot sell without the leave of the Court, so as to confer a good title on anyone other than a purchaser for value without notice: *Stevens v. Theatres, Ltd.*, W. N. (1903) 68.

(q) *London and County Banking*

Chap. XXII.

Pending an appeal the Court will sometimes stay the sale of property directed by the decree to be sold, but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for the value (*r*).

In a case in which a wife had obtained a decree *nisi* for the dissolution of her marriage, and an order had been made that the husband should secure a sum for her maintenance, and that for such purpose it should be referred to one of the conveyancing counsel to draw a deed, the Court granted an injunction restraining the husband from parting, or otherwise dealing with his interest in certain property until the execution of the deed (*s*).

Trustees for sale will not be restrained from selling because they cannot show a good title (*t*). A trustee for sale may not avoid a fair and unobjectionable contract by entering into a subsequent contract for a higher price (*u*).

When the thing about to be sold is in the nature of a specific chattel, which cannot be the subject of adequate compensation by damages, the defendant will be restrained by injunction (*x*). So also when a chattel necessary for conducting a particular business is in the possession of persons who claim a lien upon it, and threaten an immediate sale, the Court has jurisdiction to interfere by injunction and prevent irreparable injury to the debtor by giving him an opportunity of redeeming it (*y*). A man, however, who has put a fixed price on a specific chattel, cannot be heard to say that damages at law would not be a sufficient remedy (*z*).

If a fiduciary relation exists between the parties, the right of a man who entrusts goods to another to be protected in the beneficial enjoyment of his property *in specie* is not confined to

Co. v. Lewis, 21 C. D. 490 (C. A.).
As to restraining sales by mortgagees, see *ante*, p. 462.

(*r*) *Nerot v. Burnand*, 2 Russ. 56;
Jenkins v. Herries, Sug. V. & P. 63.

(*s*) *Newton v. Newton*, (1896) P. 36.

(*t*) *Roberts v. Bozon*, 3 L. J. Ch. (O. S.) 113.

(*u*) *Goodwin v. Fielding*, 4 D. M.

& G. 90, 104; and see the *Trustee Act*, 1893, s. 14.

(*x*) *Tonnins v. Prout*, 1 Dick. 387 (diamonds); *Ridgway v. Roberts*, 4 Ha. 106 (a ship); *Falcke v. Gray*, 4 Drew. 651 (china jars).

(*y*) *North v. Great Northern Railway Co.*, 2 Giff. 69.

(*z*) *Dowling v. Betjemann*, 2 J. & H. 544 (a picture).

articles possessing any peculiar or intrinsic value. Whatever the description of the chattels may be, the Court will interfere to prevent a sale either by the party entrusted with the goods, or by a person claiming under him through an abuse of power (a). An agent, accordingly, was restrained from parting with the possession of furniture and household effects by which the plaintiff's title to the same would be embarrassed (b).

If a plaintiff makes out a *prima facie* case of being entitled to a vendor's lien, the Court will restrain the purchaser from selling the property until the hearing (c).

If goods have been wrongly seized by a sheriff, the Court will, upon a proper case being made out, restrain him from remaining in possession or selling the goods (d); but the usual course is for the sheriff, after receiving notice of conflicting claims, to take out an interpleader summons, and for the rights of the parties to be determined upon the hearing of such summons (e).

The Court may, under 22 & 23 Vict. c. 61, s. 5, restrain a husband against whom a decree of divorce has been obtained from selling or incumbering real estate comprised in a post-nuptial settlement (f).

Where a will gave the trustees power of sale to be exercised at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, the Court refused to restrain a sale by the trustees at the request of and for the benefit of the tenant for life, on merely speculative evidence adduced by the remainderman objecting to an immediate sale of an expected future increase in the value of the property from the development of coal mines and the construction of a railway through the estate (g). The

(a) *Wood v. Rowcliffe*, 3 Ha. 306, C. D. 69 (C. A.); *Aylwin v. Evans*, 2 Ph. 382. See *Pooley v. Budd*, 14 47 L. T. N. S. 568.
Beav. 34.

(b) *Wood v. Rowcliffe*, 3 Ha. 306, *Hilliard v. Hanson*, 21 C. D. 71, 72.

309, 2 Ph. 382. (f) *Watts v. Watts*, 24 W. R. 623.

(c) *Blakeley v. Dent*, 15 W. R. 663. (g) *Thomas v. Williams*, 24 C. D. 558.

(d) See *Hilliard v. Hanson*, 21

Chap. XXII. Court will, upon a proper case being made out, restrain a tenant for life from selling under the Settled Land Act—*e.g.*, in the case of a sale at so gross an undervalue as to be evidence of fraud (*h*), or, where there are no trustees for the purposes of the Act (*i*).

Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before the Court will grant such assistance, the plaintiffs must show their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at the place of destination, and from all liability on the bills of lading (*k*).

Where the sale of a mortgaged estate has been effected under the judgment of a Court of competent jurisdiction in a colony, and no case of fraud is made out, equity has no jurisdiction to interfere by injunction (*l*).

Injunction
against the
negotiation of
securities, &c.

If there is danger that a negotiable instrument fraudulently or improperly obtained, or which ought not to be negotiated, will get into the hands of a *bonâ fide* holder without notice, to the prejudice of the maker or acceptor, or persons interested in the same, the Court will interfere to restrain the negotiation, assignment, or endorsement of the instrument, and will order it to be delivered up (*m*).

In *Bank of England v. Anderson* (*n*), an injunction was granted at the suit of the Bank to restrain a banking company, carrying on business within the distance of sixty-five miles from London, from accepting a bill of exchange

(*h*) *Wheelwright v. Walker*, 23 C. D. 752, 762; and see *Humpden v. Earl of Buckinghamshire*, (1893) 2 Ch. 531 (C. A.); and see also s. 53 of the Settled Land Act, 1882.

(*i*) *Wheelwright v. Walker*, 23 C. D. 752.

(*k*) *Rayne v. Benedict*, 10 L. J. Ch. 297.

(*l*) *White v. Hall*, 12 Ves. 321. Comp. *Lord Cranstown v. Johnstone*, 3 Ves. 182, 5 Ves. 277.

(*m*) *Hood v. Aston*, 1 Russ. 412; *Green v. Pledger*, 3 Ha. 165; *Lord Lewes v. Barnett*, 1 Set. 727, 728; *Thiedemann v. Goldsmidt*, 1 D. F. & G. 4; *Day v. Longhurst*, W. N. (1893) 3.

(*n*) 2 Keen, 328.

payable at less than six months from the time of giving such acceptance (o). Chap. XXII.

An injunction may, upon a proper case being made out, be obtained restraining the defendant from parting with documents in his possession belonging to the plaintiff, and from preventing the plaintiff and his solicitor from having access to the documents at reasonable times after reasonable notice (p).

In *Glasse v. Marshall* (q), the East India Company were restrained from paying over the principal and interest secured upon East India Bonds to a person who had wrongfully obtained possession of them, or to any other person than the lawful owner.

The Court will not grant an injunction to restrain a man who is alleged to be a debtor from parting with (r) or dealing with (s) his property as he pleases. Where no order has been made by the Court for the payment of money, the Court has no power to make an order to restrain a man from removing his property out of the jurisdiction (t). But if an order has been made for the payment of money, the Court will restrain a man from removing his property so as to put it out of the control of the Court (u). Moreover, under s. 32 of the Matrimonial Causes Act, 1857, and the rules made under the provisions of the Divorce Acts, the Court has power before a decree *nisi* for divorce has been made absolute, to confirm the report of the Registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife upon the decree becoming absolute, and in the meantime to restrain him from dealing with his property so as not to leave sufficient security (x).

Injunctions
against parting
with property.

In *Gooch v. London Banking Association* (y), an injunction

(o) See *Bank of England v. Booth*, 1b. 466; 7 Cl. & Fin. 509.

(p) *Goodale v. Goodale*, 16 Sim. 316.

(q) 15 Sim. 71.

(r) *Robinson v. Pickering*, 16 C. D. 661, 663, per James, L.J.

(s) *Ib.*; *Mills v. Buenos Ayres Co.*, 5 Ch. 621.

(t) *Newton v. Newton*, 11 P. D. 11.

(u) *Sidney v. Sidney*, 17 L. T. N. S. 9.

(x) *Waterhouse v. Waterhouse*, (1893) P. 284 (C. A.); *Newton v. Newton*, (1896) P. 36.

(y) 32 C. D. 41 (C. A.); *Lord Elphinstone v. Monkland Iron, &c.*,

Chap. XXII.

was granted on motion to restrain a company in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease.

There being a dispute as to the appointment of an administrator, the Court restrained one of the parties who was in possession of the personal estate of the deceased from disposing or removing any of the estate of the intestate (z).

Although the Court has no jurisdiction to interfere with the sovereign acts of a foreign government, or to make a decree against a foreign ambassador who does not submit to the jurisdiction (a), an injunction may be had restraining a third party from handing over to a foreign ambassador a fund, the right to which is in dispute (b), or restraining the agent of a foreign government from parting with securities which ought to be deposited in this country as security to bondholders (c). A foreign sovereign may submit to the jurisdiction of the Courts here, but such submission cannot take place until the jurisdiction is invoked. The fact, therefore, that a foreign sovereign has been residing in this country and has entered into a contract here, under an assumed name as being a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract (d).

Injunctions
to restrain
arbitrators from
making awards.

The Court will not, as a rule, restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious (e). But the Court may restrain a party from proceeding with an arbitration if an action is pending impeaching the instrument which contains the agreement

Co., 11 A. C. 332. But see *Craig's Claim*, (1895) 1 Ch. 267, 276 (C. A.).

(z) *Brand v. Mitson*, 24 W. R. 524.

(a) *Ante*, p. 7.

(b) *Gladstone v. Musurus Bey*, 1 H. & M. 495.

(c) *Foreign Bondholders v. Pastor*,

23 W. R. 109.

(d) *Mighell v. Sultan of Johore*, (1893) 149 (C. A.).

(e) *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 30 (C. A.); and see *Wood v. Lillies*, 61 L. J. Ch. 158; *Farrar v. Cooper*, 44 C. D. 323.

to refer (*f*). Moreover, the conduct of the parties may found a sufficient ground for the interference of the Court (*g*). An injunction accordingly may be had to restrain an arbitrator from proceeding with a reference on the ground of corruption (*h*). So also if it is discovered in the course of the arbitration by one of the parties, to whom it was at first unknown, that the arbitrator has an interest in the subject-matter of the award, or if the arbitrator has so misconducted himself as to be obviously unfit for the exercise of such functions, the Court will restrain him from acting (*i*).

The rule, however, which applies to a person holding judicial office, that he ought not to hear cases in which he might be suspected of a bias, does not apply to an arbitrator named in a contract to whom both parties have agreed to refer disputes. In order to justify the Court in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish at least a probability that he will in fact be unfairly biased in favour of one of the parties in giving his decision (*k*). Accordingly, where a contract contained a provision referring disputes to the engineer of the employers, and disputes having arisen the contractors brought an action for the purpose of having the same determined, the Court ordered a stay under s. 4 of the Arbitration Act, 1889, notwithstanding the fact that the engineer would, in substance, be acting as a judge in his own cause; no sufficient reason having been given for suspecting that the engineer would act unfairly (*l*).

Where an umpire has been irregularly appointed, the Court will restrain him from acting (*m*).

(*f*) *Kitts v. Moore*, (1895) 1 Q. B. 253 (C. A.).

(*g*) *Pickering v. Cape Town Railway Co.*, 1 Eq. 84.

(*h*) *Malmesbury Railway Co. v. Budd*, 2 C. D. 113.

(*i*) *Beddow v. Beddow*, 9 C. D. 92; *Jackson v. Barry Railway Co.*, (1893) 1 Ch. 238, 249 (C. A.).

(*k*) *Eckersley v. Mersey Docks*,

(1894) 2 Q. B. 667 (C. A.); *Jackson v. Barry Railway Co.*, *supra*; *In re Haigh and L.N.W. and G.W. Railway Companies*, (1896) 1 Q. B. 649; *Bright v. River Plate Construction Co.*, (1900) 2 Ch. 835.

(*l*) *Ives and Barker v. Willans*, (1894) 2 Ch. 478 (C. A.).

(*m*) *Pescod v. Pescod*, W. N. (1888) 2, 58 L. T. N. S. 76.

Chap. XXII.
Injunctions
between husband
and wife.

The Court will restrain a husband from disposing of or intermeddling with the wife's separate estate (*n*); from molesting or interfering with her in a business which has been assigned to her separate use (*o*); from assigning or dealing with property to which the wife has become entitled, pending a suit by her to enforce her equity to a settlement in respect of the same (*p*); or from dealing with property to which the wife was entitled at the date when she went through the ceremony of marriage with the defendant, pending a suit instituted by her in the Divorce Court for declaration of nullity of such marriage (*q*). So also the Court will enforce by injunction legal and proper covenants in a separation deed (*r*).

In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the Court will not, before the creditor has established his right by obtaining a judgment, restrain the defendant from dealing with her separate estate (*s*). In a recent case in which an action brought by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, which were directed to be taxed and to be paid out of her separate estate, but not otherwise, it turned out that the only separate property of the married woman consisted of a share coming to her under a will. Before the taxation of the costs had been completed the trustees of

(*n*) *Green v. Green*, 5 Ha. 400 n.; 45; *Gaynor v. Gaynor*, (1901) 1 Wood v. Wood, 19 W. R. 1049; Ir. R. 217.

Symonds v. Hallett, 24 C. D. 346. (*p*) *Roberts v. Roberts*, 2 Cox, 422; *Ellis v. Ellis*, 2 Co. C. C. 234. See *Osborne v. Morgan*, 9 Ha. 432.

(*q*) *Sealey v. Gaston*, 13 W. R. 577.

(*r*) *Hamilton v. Hector*, 6 Ch. 701, S. C. 13 Eq. 511; *Besant v. Wood*, 12 C. D. 605; *Marshall v. Marshall*, 5 P. D. 19; *Aldridge v. Aldridge*, 13 P. D. 210.

(*s*) *Robinson v. Pickering*, 16 C. D. 660 (C. A.).

(*o*) *Donnelly v. Donnelly*, 31 Sol. J.

the will, being about to distribute their estate and pay the plaintiff her share, the Court, upon the application of the defendants, appointed a receiver of such share, as security for payment to the defendants of their costs when taxed (t).

A wife who has divorced her husband and obtained an order for alimony to be payable out of his then present income until further order is in the position of a judgment creditor; and it has been held that in such a case the wife may, in an action against the husband and the trustees of a settlement, under which the husband has a life interest, obtain an injunction to restrain the trustees from acting upon any consent given by the husband to the exercise of the power of advancement in favour of children contained in the settlement (u). So also, if an order has been made for the payment of alimony, the Court will restrain a husband from getting rid of his property or putting it out of his power (x). But the Court has no jurisdiction, where there is no subsisting order for alimony, to restrain a husband who is respondent in a matrimonial suit from removing his property out of the jurisdiction (y).

Where it appears that an infant ward is about to make a marriage without the consent of the Court, an injunction will be granted not only to restrain the marriage, but also all communication with the infant, and all intercourse, either personal or by letter; and if the guardian is suspected of countenancing the intended marriage, he will be restrained from permitting the marriage or giving his consent without the leave of the Court (z). If the infant about to contract an improper marriage has no property, or is not a ward of Court, his parent may, by settling a small sum of money for his or her benefit, in order to give the Court jurisdiction, and bringing an action for the execution of the trusts of the settlement obtain an injunction to restrain the other party with whom

Injunctions
against marrying
infant wards
of Court.

(t) *Cummins v. Perkins*, (1899) 1 Ch. 16 (C. A.).

(u) *Oliver v. Lowther*, 28 W. R. 381.

(x) *Sidney v. Sidney*, 17 L. T. N. S. 9; *Newton v. Newton*, (1896) P. 36.

(y) *Newton v. Newton*, 11 P. D. 11.

(z) *Smith v. Smith*, 3 Atk. 307; *Pearce v. Crutchfield*, 14 Ves. 206; *Warter v. York*, 19 Ves. 454; *Norris v. Ormond*, W. N. (1883) 38.

Chap. XXII.

Injunctions
against parents
with respect to
custody and
education of
children.

marriage is contemplated from marrying or having any communication with the infant (a). But after a person who has been a ward of Court has attained the age of twenty-one, there is no jurisdiction to restrain such person from marrying, or settling, or disposing of his or her property in any way desired (b).

The Court may also, on a proper case being made out, deprive a father in case of immorality, cruelty, ill-treatment, &c., of his legal right to the custody of his children (c). Children will not be removed from their father merely because he is poor, or unable to maintain them (d). Mere acts of harshness or severity of a father, or the fact of a somewhat passionate temper, are not sufficient ground for removing the children from his custody. To warrant the removal of children from the custody of their father, a case is generally required to be made out either of moral turpitude, or of cruelty, so as to render him unfit to have the management of them (e). The fact that a father is living in adultery with a woman is not in itself a sufficient ground to induce the Court to deprive him of the custody of his child, where no misconduct on his part is shown with reference to the management and education of the child (f).

Guardianship of
Infants Act,
1886.

The Guardianship of Infants Act, 1886, has made great alterations in the old law in regard to the custody of infants. By s. 2, upon the death of the father, the mother becomes the guardian, either alone or jointly with a guardian appointed by the father. By s. 5 the Court may, upon the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant, and the right of access of either parent, "having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as

(a) *Dawson v. Thompson*, 12 L. T. N. S. 178. See *Gynn v. Gilbard*, 1 Dr. & Sm. 356. For form of statement of claim in which plaintiff claims to be made a ward of Court, see R. S. C. App. C., sect. III., 14.

(b) *Bolton v. Bolton*, (1891) 3 Ch. 270 (C. A.).

(c) *Powell v. Cleaver*, 2 Bro. C. C.

429; *Shelley v. Westbrooke*, Jac. 266 n.; *Anon.*, 2 Sim. N. S. 54, 69.

(d) *Re Fynn*, 2 De G. & S. 457; *Re Curtis*, 28 L. J. Ch. 458.

(e) *Re Curtis*, *supra*; *Blake v. Wallscourt*, 7 L. T. 545; *Hamilton v. Hector*, 6 Ch. 701, S. C. 13 Eq. 511.

(f) *Ball v. Ball*, 2 Sim. 35.

well of the mother as of the father"; and by s. 6 the Court may, Chap. XXII.
in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting under the Act (*g*).

Under s. 5 of the Act of 1886 the Court has, after taking into account the various considerations mentioned in that section, full jurisdiction to entirely override the common law rights of a father in relation to the custody of his infant children (*h*).

It is now well settled that in questions concerning the custody of infants, the main consideration to which regard will be had is the welfare of the child. As laid down by the Court of Appeal (*i*) in a case which raised the question of the custody of a penniless child under the care of a legal guardian who was able and willing to maintain and educate the child at his own expense, "The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." Welfare of the infant is the main consideration.

So also, although, with reference to the religious education of an infant, the Court will as a rule have regard to and enforce the wishes of the father (*k*), nevertheless, the paramount consideration is always the welfare of the child; and accordingly, if a sufficient case is made out in the infant's interest, the Court may disregard the father's wishes with reference to the religious education, even though the father be still living (*l*).

(*g*) See also the Custody of Children Act, 1891, s. 3, and the Prevention of Cruelty to Children Act, 1894, ss. 6—8. 143, 148 (C. A.); and see *The Queen v. Gyngall*, (1893) 2 Q. B. 232, 243 (C. A.).

(*h*) *In re A. and B. (Infants)*, (1897) 1 Ch. 786 (C. A.). (*k*) *In re Scanlan*, 40 C. D. 200; *In re McGraith*, (1893) 1 Ch. p. 148.

(*i*) *In re McGraith*, (1893) 1 Ch. (*l*) *In re Newton*, (1896) 1 Ch. 740 (C. A.).

Chap. XXII.

In a recent case, a testator who died in 1896 by his will appointed his sister guardian of his infant daughter, then aged eleven. The testator was a Protestant, and the child was brought up in that faith; but in 1900 the sister from conscientious motives became a Roman Catholic. It was held that in the interest of the infant the testator's sister must be removed from the guardianship (*m*).

Injunctions to
restrain burial.

The Court has jurisdiction to restrain the incumbent of a parish from burying in the churchyard without the consent of the churchwardens or parishioners of the parish, the corpse of a person not being a parishioner of the parish (*n*). In *Wright v. Wallasey Local Board* (*o*) an injunction was granted to restrain the owners of a cemetery from permitting burials within 100 yards from the dwelling-house of the plaintiff under the provisions of 18 & 19 Vict. c. 128, s. 9.

Injunctions
against petition
to wind up.

The Court has jurisdiction to restrain by injunction the creditor of a solvent company, whose claim is disputed, from presenting a petition to wind up the company (*p*). Moreover, where a petition against a company is presented, ostensibly for a winding-up order, but in reality for another purpose, such as putting pressure on the company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so (upon application being made to the Court in which the petition is pending) without requiring an action to be brought, by restraining the advertisement of the petition and staying all proceedings upon it (*q*).

No injunction
to restrain the
assumption of
a name.

The assumption of the patronymic name of another family will not be restrained, unless in cases where it has been exclusively used in connection with a particular business (*r*).

(*m*) *F. v. F.*, (1902) 1 Ch. 688; and see *In re Grey*, (1902) 2 Ir. R. 684.

(*n*) *Att.-Gen. v. Strong*, 1 Set. 559.

(*o*) 18 Q. B. D. 783.

(*p*) *Cadiz Waterworks Co. v. Barnett*, 19 Eq. 182; *Niger Merchants' Co. v. Capper*, 18 Ch. D. 557 n.;

Cercle Restaurant Castiglione Co. v. Lavey, ib. 555; *New Travellers' Chambers, Limited v. Cheese & Green*, 70 L. T. 271.

(*q*) *In re A Company*, (1894) 2 Ch. 349.

(*r*) *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; *Earl Cowley v. Countess Cowley*, (1901) A. C. 450,

In a recent case in which the marriage of a commoner with a peer of the realm had been dissolved by the Divorce Court, and the wife afterwards, on marrying a commoner, continued to use the title she acquired by her first marriage, it was held that she did not thereby commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possessed in his title, as to entitle him, in the absence of malice, to an injunction (*s*). Chap XXII.

An injunction will not be granted (in the absence of fraudulent intent or the like) to restrain a man from adopting as the name or designation of his house or land a name for a long time used by a neighbour to designate his house or land (*t*). In *Street v. Union Bank of Spain* (*u*) the Court would not grant an injunction to restrain a man from registering at the Post Office as a telegraphic address an abbreviation used for many years for the same purpose by the plaintiff.

In a recent case in which the defendant, who was the proprietor of a recipe for making a certain liquid called "Sallyco," and had used, without authority, the name of the plaintiff, a medical man, to puff his sales, it was held by the Court of Appeal that the plaintiff had no cause of action either for damages or for an injunction, it not being shown that the publication was defamatory, or that it injured the plaintiff in his property, business, or profession (*x*).

An injunction may be had to restrain a man from opening letters addressed to another (*y*). *Primâ facie* all letters must be taken to be intended for the person to whom they are addressed, but if the person to whom they are addressed is the secretary of a company, the company may open such letters as appear from some other indication than the mere address to be intended for them. Letters not bearing any such indications may not be opened by the company

Injunction
against opening
letters &c.

460; and see *Re Greenwood*, (1902) 2 Ch., p. 202.

(*u*) 30 C. D. 156.

(*s*) *Earl Cowley v. Countess Cowley*, (1901) A. C. 450.

(*x*) *Dockrell v. Dougall*, 80 L. T. 556 (C. A.).

(*t*) *Day v. Brownrigg*, 10 C. D. 306 (C. A.).

(*y*) *Scheile v. Brakell*, 11 W. R. 796; *Edgington v. Edgington*, 11 L. T. N. S. 299.

Chap. XXII. except in the presence of the person to whom they are addressed (z).

A man who has been dismissed by his employers has no right to give a notice to the Post Office, the effect of which would be to hand over to him letters, the greater part of which probably relate only to the business of his employers. In such a case the Court will, if necessary, grant a mandatory injunction compelling the defendant to withdraw his notice, the plaintiff being put on an undertaking only to open letters addressed to the defendant at certain specified times with liberty for the defendant to be present at the opening of them (a).

The prosecutors, in a trade mark case, offered no evidence against the offender and he was acquitted, he giving a letter of apology with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements and continued to do so for nearly two months. It was held that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter (b).

Injunctions to restrain publication of proceedings pending before courts of justice.

The Court has the power to prohibit the publication of proceedings which are pending in all cases where the interests of justice are likely to be injuriously affected by their publication (c). But it is in each case a matter for the discretion of the Court whether or not it will interfere. The Court will not restrain every report in the columns of a newspaper which may appear to be unfair in any respect (d). If, however, the case is one in which the Court feels it ought to interfere, it is no excuse that the publication may have been by defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained from the costs

(z) *Stapleton v. Foreign Vineyard Association*, 12 W. R. 976.

(a) *Hermann Loog v. Bean*, 26 C. D. 306 (C. A.).

(b) *Fisher and Co. v. Apollinaris Co.*, 10 Ch. 297.

(c) *Anon.*, 2 Atk. 469, 2 Ves. 520; *R. v. Clement*, 4 B. & Ald.

219.

(d) *Brook v. Evans*, 29 L. J Ch.

616.

of the motion for that purpose (e). In *Mackett v. Commissioners of Herne Bay* (f), the Court restrained a minister from preaching a sermon upon a subject having reference to a pending action, and also from issuing placards announcing his intention to preach such a sermon.

Chap. XXII.

In a recent case it was held that where a petition is pending for the compulsory winding up of a company, it is a contempt of Court to issue a circular to the shareholders of the company containing misrepresentations with intent to obtain a resolution of the company for voluntary winding up, and thereby mislead the Court as to the real view of the shareholders (g).

Contempt of court.

Where the Court has decided that a case should be heard *in camerâ*, it is a contempt to publish an account of the proceedings. As was said by North, J., in a recent case (h):—"It was also with great energy contended before me that all proceedings in a Court of Justice ought to be public, and that there could not be any contempt in publishing what took place in Court; but in that I do not agree. The general rule is an excellent one, that legal proceedings should be in public; and if it were departed from the great weight which legal decisions carry with them in this country would be deservedly diminished. But to this rule certain exceptions are proper and necessary. One ground of exception is, if a public hearing would have the effect of disclosing what it is the whole object of the action to keep concealed, as in *Andrew v. Raeburn*, 9 Ch. 522, and *Mellor v. Thompson*, 31 C. D. 55, or of making known to the world a secret process, as in *Badische Amlin und Soda Fabrik v. Levinstein*, 24 C. D. 156. The hearing in private wholly or in part of cases in which public decency and morality require it to be done are also familiar, not only in the Divorce Courts, but also in the ordinary criminal and civil Courts, an instance of the latter being *Malan v. Young*, 6 T. L. R. 38. So also cases relating to lunatics are constantly heard in private; and

(e) *Coleman v. West Hartlepool Railway Co.*, 8 W. R. 734. *New Gold Coast Exploration Co., Ltd.*, (1901) 1 Ch. 860.

(f) 24 W. R. 845.

(h) *In re Martindale*, (1894) 3 Ch.

(g) *Re Septimus Parsonage and Co., Ltd.*, (1901) 2 Ch. 424; cf. 200, 201.

Chap. XXII.

cases as to wards—see *Ogle v. Brandling*, 2 R. & My. 688—in order that the lunatic or ward may not be prejudiced; and I cannot conceive a clearer contempt of Court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the Court had deliberately, in the exercise of its discretion, decided ought not to be published.”

Injunctions against committing contempt of court.

It is competent for the Court, where a contempt is threatened (i), or has been committed, to take the more lenient course of granting an injunction, instead of making an order for committal or sequestration (k).

Injunction against renewal of certificate by solicitor.

The Court has jurisdiction on a proper case being made out to restrain a solicitor who has not taken out his certificate for several years from renewing his certificate without leave of the Court (l).

Injunction against enforcing a rate.

If a good equitable case can be made to appear, the Court will grant an injunction to restrain a local Board from enforcing a rate until the opinion of the Court of Queen's Bench as to the validity of the rate has been taken, the plaintiff paying the amount of the rate into Court (m).

Injunction against pulling down a sign-board.

Where a man has made out his right to an easement to fix a sign-board on the house of another, the latter will be restrained by injunction from pulling down the sign-board (n).

Alteration by lessee in the demised premises.

In *Bickmore v. Dimmer* (o), the defendant had taken a lease of a shop for the purpose of carrying on his business of a watchmaker and jeweller. The lease contained a covenant by the lessee that he would not make or suffer to be made “any alteration” to the demised premises without the consent in writing of the lessors. The defendant, being afterwards desirous of affixing on the outside of the wall of his shop a large clock, applied to the lessors for their consent, and upon

(i) *Kitcat v. Sharpe*, 52 L. J. Ch. 134, W. N. (1882) 183.

(k) *Plimpton v. Spiller*, 4 C. D. 286 (C. A.); *J. and P. Coats v. Chadwick*, (1894) 1 Ch. 349, 350.

(l) *Re Whitehead*, 28 C. D. 614 (C. A.); 54 L. J. Ch. 796.

(m) *Ashworth v. Hebden Bridge Local Board*, W. N. (1877) 247; 47 L. J. Ch. 195.

(n) *Moody v. Struggles*, 12 C. D. 261.

(o) (1903) 1 Ch. 158 (C. A.).

their refusal he fixed the clock without their consent. It was Chap. XXII. held by the Court of Appeal that some limitation must be put on the words of the covenant, and that no breach of covenant had been committed, and an application for a mandatory injunction was accordingly refused.

Where a receiver has been appointed in an action, a party who claims paramount to the receiver cannot bring an action to restrain the receiver from acting in derogation of his rights, but must apply for relief in the action in which the receiver was appointed (*p*). Mode of proceeding when a receiver is sought to be restrained.

(*p*) *Searle v. Choate*, 25 C. D. 723 (C. A.). See *Ex parte Day*, 48 L. T. N. S. 12.

CHAPTER XXIII.

PRACTICE.

SECTION I.—IN WHAT MANNER INJUNCTIONS ARE OBTAINED.

Chap. XXIII.
Sect. 1.

THE writ of injunction under the former procedure issued pursuant to order, but under the present procedure no writ of injunction is to issue. An injunction is by judgment or order, and such judgment or order has the effect which a writ of injunction previously had (*a*). An injunction will not in general be granted, except after a writ of summons has issued (*b*). In an urgent case, however, an injunction may be granted before a writ of summons has issued (*c*). In such a case the affidavit should be intituled in the contemplated action (*d*). So also where, on account of the offices of the Court being closed, the issuing a writ of summons has been delayed, the Court may grant an injunction before a writ of summons has issued, upon the undertaking of the party applying to issue a writ of summons immediately (*e*). A plaintiff should endorse his writ with a claim for an injunction, when the obtaining it is a substantial object of his action (*f*). But leave may be obtained to amend the endorsement by inserting a claim for an injunction (*g*). The nature of the injunction claimed should also appear from the endorsement on the writ (*h*).

(*a*) Ord. L. r. 11.

(*b*) *Savory v. Dyer*, Amb. 70; Mitf. Pl. 55; cf. *Carter v. Fey*, (1894) 2 Ch. 541 (C. A.).

(*c*) *Thorneloe v. Skoines*, 16 Eq. 126.

(*d*) See *Young v. Brassey*, 1 C. D. 277.

(*e*) *Carr v. Morice*, ib. 125; Cam-

pana v. Webb, 22 W. R. 622; 4 T. R. 331.

(*f*) Ord. III.; *Colebourne v. Colebourne*, 1 C. D. 690.

(*g*) Ord. XXVIII. r. 1; *Colebourne v. Colebourne*, 1 C. D. 690.

(*h*) R. S. C., App. A., Pt. 3, s. 4; *Re Myers' Patent*, 26 Sol. Jo. 371.

A writ of summons, or notice of a writ, may be allowed by the Court to be served out of the jurisdiction, when an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed (*i*). But it seems doubtful whether the Court can give leave to serve notice of motion with the writ out of the jurisdiction (*k*).

At the trial of the action an injunction will sometimes be granted, although not claimed upon the endorsement of the writ (*l*). So also after judgment, parties to the action, or persons who have come in under the decree, will be restrained from violating the spirit of or taking proceedings that are contrary to the decree, although an injunction be not claimed upon the writ of summons (*m*). The Court will also, under similar circumstances, interfere to prevent injury to property, either by the parties litigant or others. Thus, if after a decree to account, the mortgagor attempts to cut timber, the Court will enjoin him, though an injunction was not claimed (*n*).

The application for an injunction must be made by a party having sufficient interest (*o*). A man who has no personal interest in the matter cannot move for an injunction, even though he may have been made a party to the action (*p*). If the act complained of affects the public interest, the action should be brought by the Attorney-General at the instance of a relator (*q*).

Where a party wrongfully claims a right to do a thing, even though he says he has no present intention to do it, there is a

Chap. XXIII.
Sect. 1.

Injunction
sometimes
granted although
not claimed
by writ.

Parties.

Who may be
defendants.

(*i*) Ord. XI., r. 1 (*f*).

(*k*) See *Manitoba, &c., Land Corporation v. Allan*, (1893) 3 Ch. 432; *Overton v. Burn*, 74 L. T. 776; *Hersey v. Young*, W. N. (1894) 18.

(*l*) *Reynell v. Sprye*, 1 D. M. & G. 660; *Bloomfield v. Eyre*, 8 B. 250, 259; *Goodman v. Kine*, 8 B. 379.

(*m*) *Casamajor v. Strode*, 1 Sim. & St. 381; *Grand Junction Canal Co. v. Dimes*, 17 Sim. 38.

(*n*) *Wright v. Atkins*, 1 V. & B.

313.

(*o*) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164; *Leake v. Beckett*, 1 Y. & J. 339.

(*p*) *Hunter v. Nockolds*, 15 L. J. Ch. 320.

(*q*) *Att.-Gen. v. Compton*, 1 Y. & C. C. 417; *Soltau v. De Held*, 2 Sim. N. S. 150. See *ante*, pp. 87, 119; and see also *Boyce v. Paddington Borough Council*, (1893) 1 Ch. 109.

Chap. XXIII.
Sect. 1.

ground for making him a party to an action for an injunction to restrain him from doing it (*r*). A man who has assigned or disposed of his interest in the subject-matter should not be made a party to the action (*s*). But the parting by a defendant with his interest after the bringing of the action does not disentitle the plaintiff to an injunction (*t*). Executors cannot be sued for an injunction in respect of a tort by their testator (*u*).

Absence of parties.

Where there is a case for an injunction, and the injunction will operate for the benefit of parties not before the Court, the absence of those parties will not prevent the Court from interfering. It is enough that the property sought to be protected is in danger (*x*). In cases of injunction the Court frequently acts for parties in their absence (*y*); but where the injunction would injuriously affect the rights of persons not before the Court, the Court will not ordinarily and without special necessity interfere (*z*).

An injunction
—when extended
to persons not
parties to action.

An injunction will not in general be granted except the party against whom it is claimed is a party to the action (*a*). There are, however, exceptions to the rule. A man, for example, who has purchased under a decree will be restrained from acting contrary to the spirit of the decree, although not a party to the action (*b*). So also a tenant holding under a receiver will be restrained on motion, though not a party to the action (*c*). The defendant's attornies, agents, servants, and workmen may be enjoined, although the statement of claim and notice of motion

(*r*) *Hext v. Gill*, 7 C. D. 699;
Shafto v. Bolckow & Co., 35 W. R.
562.

(*s*) *Hawkins v. Gardiner*, 1 W. R.
345; *Clements v. Welles*, 1 Eq. 200.
Comp. Evans v. Davies, 10 C. D.
747.

(*t*) *Bird v. Lake*, 1 H. & M. p. 121.

(*u*) *Kirk v. Todd*, 21 C. D. 484,
487 (C. A.).

(*x*) *Const v. Harris*, T. & R. 514;
Evans v. Coventry, 5 D. M. & G.
911; *Hamp v. Robinson*, 3 D. J. &
S. 109.

(*y*) *Const v. Harris*, T. & R. 514;
Evans v. Coventry, 5 D. M. & G.
911.

(*z*) *Hartlepool Gas and Water Co.
v. West Hartlepool Harbour and
Railway Co.*, 12 L. T. N. S. 366.
See *M'Beath v. Ravenscroft*, 8 L. J.
Ch. N. S. 208.

(*a*) *Iveson v. Harris*, 7 Ves. 256;
Brown v. Frost, Sug. V. & P. 229, n.

(*b*) *Casamajor v. Strobe*, 1 Sim. &
St. 381.

(*c*) *Walton v. Johnson*, 15 Sim.
352.

may only ask for an injunction against the defendant (*d*), but the injunction will not be extended to the defendant's tenants (*e*). As to punishing for contempt of Court persons, not parties to the action, who aid in committing a breach of the injunction, see later (*f*).

Chap. XXIII.
Sect. 1.

Where an injunction forms a substantial part of the relief claimed in the action, the usual course is to move for an interlocutory injunction until the action is disposed of. Notice of motion may be served at any time after appearance has been entered or (*g*) after the time limited for entering an appearance has expired and the defendant has made default in appearing; or, by leave of the Court or a judge to be obtained *ex parte*, notice of motion may be served with the writ, or after service of the writ and before the time limited for appearance (*h*). In such cases the notice must state that it is by leave (*i*); and where a party obtains leave to serve *short* notice of motion (*k*) the notice must expressly state that such leave has been obtained (*l*).

Motion for an
injunction.

Short notice.

By Ord. L. r. 6, an application for an injunction may be made to the Court or a judge by any party. If the application be made by the plaintiff, it may be either *ex parte* or with notice; if by any other party, then on notice to the plaintiff, and at any time after appearance of the party making the application.

Who may apply.

Under this rule, a defendant may before judgment apply for an injunction or a receiver; and he may do so, notwithstanding that the plaintiff has already served notice of motion for the like purpose (*m*). A defendant may apply for an injunction against the plaintiff without putting in a defence and counterclaim, or issuing a writ in a cross-action, *provided that* the relief in respect of which the injunction is claimed is

Application by
defendant.

(*d*) *Humphreys v. Roberts*, 1 Set. 521; *Seward v. Paterson*, (1897) 1 Ch. p. 551.

(*e*) *Hodson v. Coppard*, 29 Beav. 4.

(*f*) *Post*, pp. 595, 596.

(*g*) Ord. LII. r. 8.

(*h*) Ord. LII. r. 9.

(*i*) *Chambers v. Toynbee*, 12 W. R. 1100.

(*k*) *I.e.*, less than two clear days.

(*l*) *Dawson v. Beeson*, 22 C. D. 504 (C. A.).

(*m*) *Sargant v. Read*, 1 C. D. 600.

Chap. XXIII.
Sect. 1.

incident to, or arises out of, the plaintiff's cause of action (n). Accordingly in an action in which both the plaintiff and the defendant relied, from different points of view, upon the same agreement, it was held that the defendant was entitled to apply for an injunction as soon as he had entered appearance in the action (o).

Service of notice
of motion.

A plaintiff's notice of motion should be served upon the defendant. If there are several defendants, but the motion only concerns one of them, he alone should be served. If all the defendants are interested in the motion, all should be served (p).

The notice is served either personally on the party, or on his solicitor if he has appeared by a solicitor; and if it is made out to the satisfaction of the Court or a judge that the usual service cannot be effected, an order for substituted service will be made (q).

Where a defendant has not entered an appearance, or having appeared has omitted to give an address for service as required by the rules, a notice of motion may be served on such defendant by filing the same with the proper officer (r).

If on the hearing of a motion or other application the Court or a judge is of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (s).

Injunctions may
be applied for
during vacation.

An injunction may be applied for at any stage of the proceedings (t), and as well in vacation as in term, and whether the Court is sitting or not (u). But it is not the practice in

(n) *Carter v. Fey* (1894), 2 Ch. 541 (C. A.); *Collison v. Warren* (1901), 1 Ch. 812 (C. A.).

(o) *Collison v. Warren* (1901), 1 Ch. 812 (C. A.).

(p) See *Service v. Castenada*, 9 Jur. 367.

(q) Ord. LXVII. r. 6.

(r) Ord. LXVII. r. 4.

(s) Ord. LII. r. 6.

(t) *Bacon v. Jones*, 4 M. & C. 433, 436.

(u) *Lane v. Barton*, 1 Ph. 363; *Chappell v. Davidson*, 2 K. & J. 125.

the Chancery Division to grant an injunction in chambers when the Courts are sitting (x). Chap. XXIII.
Sect. 1.

No motion should be made without previous notice to the parties affected thereby. But the Court or a judge may, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, make an order for an injunction *ex parte* (y). In very pressing cases an injunction may be applied for *ex parte* before service of the writ of summons (z), and even before issuing the writ (a). Injunctions
ex parte.

In a case in which application for an injunction *ex parte* was made after the closing of the office for issuing the writ, the injunction was granted upon the applicant filing the writ by handing it to the Registrar who was in Court, and the affidavit was allowed to be filed in the same way. The injunction was to extend over the following Monday when motions were to be continued (b).

If an *ex parte* injunction is applied for against a defendant who is out of the jurisdiction, and the Court considers that it is a proper case for an *ex parte* injunction, the order which gives leave to serve the defendant with a writ of summons may also direct that the injunction do issue from and after the issuing of the writ (c).

If, upon an application *ex parte*, the Court thinks that the case is not so urgent as to require its immediate interference, it will order notice of the application to be served on the defendant (d).

If the defendant has appeared, he must, as a general rule, be served (e). A defendant who has had notice of motion for

(x) *English v. Vestry of Camberwell*, W. N. (1875), 256. Injunctions are frequently granted in Chambers in the King's Bench Division.

(y) Ord. LII. r. 3.

(z) *H. v. H.*, 1 C. D. 276; *Colebourne v. Colebourne*, ib. 690; *Brand v. Mitson*, 24 W. R. 524.

(a) See *ante*, p. 550.

(b) *Chanock v. Hertz*, 4 T. L. R. 331.

(c) *Young v. Brassey*, 1 C. D. 277.

(d) See *Lord Byron v. Johnston*, 2 Mer. 29.

(e) *Collard v. Cooper*, 6 Madd. 190; *Perry v. Weller*, 3 Russ. 519; *Langham v. Great Northern Railway Co.*, 1 De G. & S. 497.

Chap. XXIII.
Sect. 1.

an injunction which he is willing and ready to meet ought not to have that injunction issued against him *ex parte*, and if from other engagements of counsel or the pressure of other business on the Court the plaintiff cannot bring on his motion, the inconvenience of this should fall on him, not on the defendant, who would be punished as a wrong-doer without the opportunity of being heard (*f*).

In cases of extreme urgency the Court may grant an injunction *ex parte* even after appearance (*g*). The affidavit in support of the application should, however, state the fact of appearance; otherwise it is irregular (*h*).

Form of notice.

A notice of motion must be properly entitled in the cause in which it is made (*i*), and should state on whose behalf the motion is to be made. If notice of motion be given in an information, it must be on behalf of the Attorney-General, and not on behalf of the relator (*k*).

The notice of motion must state the day on which the motion is to be made. If notice of motion be served for a day not appropriated for the hearing of motions, and the notice does not purport to be with leave of the Court, the defendant may, it seems, disregard it (*l*). Unless the Court give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; provided that in applications to answer the matters in an affidavit or to strike off the rolls, the notice must be served not less than ten clear days before the time fixed by the notice for making the motion (*m*). In the computation of the two clear days required on an ordinary

(*f*) *Graham v. Campbell*, 7 C. D. 490, 493 (C. A.).

(*g*) *Allard v. Jones*, 15 Ves. 605; *Harrison v. Cockerell*, 3 Mer. 1; *Petley v. Eastern Counties Railway Co.*, 8 Sim. 483; *Acraman v. Bristol Dock Co.*, 1 R. & M. 321; *Bell v. Hull and Selby Railway Co.*, 1 R. Ca. 623.

(*h*) *Harrison v. Cockerell*, 3 Mer. 1; *Randall v. Commercial Railway Co.*, 8 L. J. Ch. N. S. 252, 2 Coop.

C. C. 169 n.; *Sutton v. Mumford*, ib. 171 n.; *Mexican Company of London v. Maldonado*, W. N. (1890), p. 8.

(*i*) *Rowlatt v. Cattell*, 2 Ha. 186.

(*k*) *Att.-Gen. v. Wright*, 3 Bear. 447.

(*l*) *Hill v. Rimmell*, 8 Sim. 632; *Lloyd v. Gordon*, 2 Coop. C. C. 171 n.

(*m*) Ord. LII. r. 5.

notice of motion, Sundays, Christmas Day, and Good Friday are not to be reckoned (n).

Chap. XXIII.
Sect. 1.

If a proper case can be made out, leave may be had to serve short notice of motion. The leave must be stated in the notice (o). A notice of motion by way of appeal is not bad by reason of its being given for a day not in the sittings (p). In a case where there has been irregularity in obtaining leave to serve, and in serving short notice of motion, the Court may nevertheless, if the party served has not been injured by the irregularity, exercise its discretion, under Ord. LXX. r. 1, and disregard the irregularity and hear the motion on its merits (q).

The notice should state clearly the nature of the order asked for (r). Costs may be given though not asked for by the notice (s), provided that the respondent appears upon the hearing of the motion (t).

An *ex parte* application for an injunction may be made at any time according to the urgency of the case. If the motion be upon notice, it must be made upon one of the days appropriated for the hearing of motions. Every day in Term is, strictly speaking, a motion day; but it is not the practice of the Court to hear motions except on seal days. If a man desires that a motion should be heard on a day not appropriated to the hearing of motions, he must obtain leave of the Court, and then give notice to the other party (u).

Time for making motions.

Every application for an injunction must be supported by affidavits, so as to show that on the face of the evidence the application is well founded. If the application be *ex parte*, the affidavits must fully and fairly state the case within the

Affidavits.

(n) Ord. LXIV. r. 2.

180.

(o) *Harris v. Lewis*, 8 Jur. 1063;

(q) *Dawson v. Beeson*, 22 C. D.

Dawson v. Beeson, 22 C. D. 505.

505.

Leave to serve short notice of motion cannot, in vacation any more than during the sittings, be given by a master, but must be given by the Judge in person.

(r) *Brown v. Robertson*, 2 Ph.

173.

Conacher v. Conacher, 29 W. R. 230, W. N. (1881) 2.

(s) *Clark v. Jaques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525.

(t) *Pratt v. Walker*, 19 Beav. 261.

(p) *Re Coulton*, 34 C. D. 22; *Williams v. Bouville*, 17 Q. B. D.

(u) *Anon.*, 4 L. J. Ch. 204; *Chaffers v. Baker*, 2 W. R. 546; 5 D. M. & G. 482.

Chap. XXIII.
Sect. 1.

Discharging
an *ex parte*
injunction.

What the
affidavits must
show.

knowledge of the plaintiff, so that the Court may see that *prima facie* the thing is fair in the aspect in which it is presented to the Court. There must be no concealment or misrepresentation, but all the facts must be brought before the Court which are material to be brought forward (x).

The terms upon which an *ex parte* injunction is granted must be strictly complied with. Where an *ex parte* order was made upon condition that the writ was amended by adding a party who would give the usual undertaking, and this was not done until the opposite party had moved to discharge the order, the Court dissolved the *ex parte* injunction (y). If upon the hearing of a motion for an injunction, or to continue an *interim* order for an injunction already obtained *ex parte*, it appears that the *interim* order was irregularly obtained in consequence of a suppression of facts, the Court may discharge the *ex parte* order without any cross notice of motion for that purpose (z).

The affidavits in support of an *ex parte* injunction should always state the precise time at which the plaintiff or those acting for him became aware of the threatened injury (a). They must show either that notice to the defendant would be mischievous, or that the matter is so urgent that the injury threatened would, if notice were served on the defendant, be experienced before the injunction could be obtained. If the affidavits fall short of this, the motion will be ordered to stand over and notice to be served on the defendant (b). If a statement of claim be delivered, the affidavits should contain no allegation not covered by the statement of claim. Facts not founded on allegations in the statement of claim must not be introduced into the affidavits. Affidavits are to be considered only as evidence of the allegations made in the statement of

(x) *Att.-Gen. v. Mayor, &c., of Liverpool*, 1 M. & C. 210; *Castelli v. Cook*, 7 Ha. 94; *Dalglish v. Jarvie*, 2 Mac. & G. 243; *Schmitt v. Faulks*, W. N. (1893), p. 64.

(y) *Spanish General Agency Corporation v. Spanish Corporation*,

Ltd., 63 L. T. 161; W. N. (1890), p. 158.

(z) *Boyce v. Gill*, 64 L. T. 824; W. N. (1891), p. 108.

(a) *Calvert v. Gray*, 2 Coop. C. C. 171 n.

(b) See 1 L. J. Ch. pp. 3, 4.

claim, and cannot be attended to as laying a foundation for equities not claimed by the pleading (c). Chap. XXIII.
Sect. 1.

The main affidavit is usually made by the plaintiff himself (d), but it may be made by any person acquainted with the facts (e). If, however, there is no affidavit by the plaintiff personally, and no sufficient reason given why there should not be such affidavit, the Court may on that ground refuse the motion (f). The affidavits should not be sworn until after the writ of summons has issued (g). No matter what the merits might be, an injunction founded on affidavits sworn before the filing of the bill could not under the old practice stand (h). But under the new practice upon an undertaking by plaintiff to have the affidavit resworn and filed, an *interim* injunction extending over the next motion day was granted in an action where the affidavit in support of the application had been sworn two days before the issue of the writ (i). Moreover, an affidavit may be allowed to be used in an intended action in which the writ has not yet been issued (k). By whom made.

An affidavit must be intituled in the cause or matter in which it is sworn (l). It is, however, sufficient if it was correctly intituled when it was sworn, although the title of the cause may have been subsequently altered by amendment (m). Title of
affidavits.

All affidavits are to be drawn up in the first person (n). Form of
affidavits.

- (c) *Dawson v. Yates*, 1 Beav. 18 Jur. 1051.
301; *Burgess v. Horne*, 14 L. T. 461; *Wattleworth v. Pitcher*, 2 Pr. C. C. 172 n.
189; *Stocking v. Llewellyn*, 3 L. T. 33. (i) *Green v. Prior*, W. N. (1886) 50.
- (d) *Mollett v. Enequist*, 25 Beav. 609. (k) *Young v. Brassey*, 1 C. D. 277; see *ante*, 550.
- (e) *Kenworthy v. Accunor*, 3 Madd. 550; *Lord Byron v. Johnstone*, 2 Mer. 29; *Hamilton v. Board*, 1 N. R. 379. (l) Ord. XXXVIII. r. 2. But see *Blamey v. Blamey*, W. N. (1902), 138.
- (f) See *Lord Byron v. Johnstone*, 2 Mer. 29; *Spalding v. Keely*, 7 Sim. 377; *Scotson v. Gaury*, 1 Ha. 99. (m) *Hawes v. Bamford*, 9 Sim. 653.
- (g) *Francome v. Francome*, 11 Jur. N. S. 123; *Fennall v. Brown*, (n) Ord. XXXVIII. r. 7. But as to affidavits sworn abroad, see *Blamey v. Blamey*, W. N. (1902) 138.

Chap. XXIII.
Sect. 1.

Statements
based on infor-
mation and
belief—when
admissible.

The affidavit must commence by stating that the party "makes oath and says," for even though the jurat express that the party was sworn, it will not be sufficient unless the affidavit also state that the party makes oath (o).

Affidavits are to be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions in which statements as to belief, with the grounds thereof, may be admitted (p). The grounds of the deponent's belief must be stated so as to show that he has some reasonable and proper cause for making the statement, and has not sworn merely to raise an issue. Accordingly, an affidavit stating information and belief, and not stating the source of such information or belief, is irregular and inadmissible as evidence, whether on an interlocutory or on a final application; and a party or his solicitor attempting to use such an affidavit will do so at his peril as to costs (q).

Hearsay evidence is admissible on interlocutory applications as putting the opposite party to answer it, and if not expressly denied will generally be assumed for the purposes of the application to be in accordance with the facts (r).

Affidavits must
be filed.

An affidavit cannot (except by leave of the Court or a judge) be used unless it is stamped with a proper filing stamp and has been duly filed. An office copy of the affidavit may in all cases be used, the original affidavit having been previously filed and the copy duly authenticated with the seal of the office (s). The office copy should be in Court at the time of making the motion (t). In pressing cases, however, where there is not time to get the affidavit filed before the injunction is applied for, the Court will grant an injunction upon an

Office copies.

(o) *Philipps v. Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

(p) Ord. XXXVIII. r. 3.

(q) *In re J. L. Young Manufacturing Co., Ltd.*, (1900) 2 Ch. 753 (C. A.); and see *Quartz Hill Consolidated Gold Mining Co. v. Beall*, 20 C. D. 508; *In re Anthony Birrell Pearce & Co.*, (1899) 2 Ch. 50.

(r) *Bird v. Lake*, 1 H. & M. 118. But see *Stamps v. Birmingham, Wolverhampton, and Stour Valley Railway Co.*, 7 Ha. 251, 255; and see also *In re Anthony Birrell Pearce & Co.*, (1899) 2 Ch. 50.

(s) Ord. XXXVIII. r. 15.

(t) *Jackson v. Cassidy*, 10 Sim. 326; *Elsev v. Adams*, 4 Giff. 398.

undertaking to file the affidavit (*u*). Sometimes, in vacation, the Court has taken the affidavits into its own hands and then considered them as filed (*x*).

Chap. XXIII.
Sect. 1.

An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the Court, provided that it is filed on the same day as that on which the order is made (*y*).

Affidavits to be used on motions may be filed up to the last moment before the hearing (*z*). But the Court will not allow a party to gain an advantage from filing affidavits at the last moment (*a*); but will in such a case direct the motion to stand over to enable the defendant to answer the affidavits (*b*).

Time of filing
affidavits.

Under the former procedure, when an application was made to the Court by motion and the opposite party did not appear, no order was drawn up unless an affidavit of service of notice of motion was filed at the latest before the rising of the Court on the day on which the application was made (*d*); but this practice no longer prevails, and affidavits of service can now be sworn and filed at any time before the order is drawn up (*e*).

Except by leave of the Court or a judge, no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion (*f*).

(*u*) *Nieman v. Harris*, W. N. Kay, App. 17.
(1870) 6.

(*x*) *Att.-Gen. v. Lewis*, 8 Beav. Sim. 34; *Marshall v. Colehill*, 2
179; *Carr v. Morice*, 16 Eq. 125. Coop. C. C. 172 n.

(*y*) *In re King & Co.'s Trade Mark*, (1892) 2 Ch. 462. (e) Memorandum issued to Registrars by C. A.; see. 28 Sol. Jo. 591. See *Seear v. Webb*, 25 C. D. 84, where the old practice is discussed.

(*z*) *Ex parte Leicester*, 6 Ves. 432; *Munro v. Wivenhoe, &c., Railway Co.*, 4 D. J. & S. 726. (f) Ord. XXXVIII. r. 19.

(*a*) *Carew v. Yates*, 1 W. R. 11.

(*b*) *Ib.*; *Besemer v. Besemer*,

K.I.

Chap. XXIII.
Sect. 1.

Delivery of
copies of
affidavits.

The party requiring a copy of an affidavit, or his solicitor, should make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or a judge may direct, and is to be furnished accordingly upon demand and payment of the proper charges (*g*). In the case of an application for an *ex parte* injunction, the party applying must deliver copies of the affidavits upon which it was granted upon payment of the proper charges, immediately upon the receipt of such request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court or a judge (*h*).

Evidence after
motion opened.

After the motion is opened no new evidence can be offered except with the leave of the Court (*i*). The Court may, however, admit affidavits after the case is opened, if a failure of justice is likely to occur by reason of their rejection or if great inconvenience would ensue (*k*). The Court may take notice of matters given in evidence in previous proceedings in the cause and may refer to notes made by the Court on such occasions (*l*).

Upon appeal from an order granting or refusing an interlocutory injunction, fresh evidence may be adduced in support of or to discharge the injunction (*m*). The rule that no new evidence can be adduced on a motion after it is opened extends to the case of documents which it is proposed to verify *vis à voce* by the attesting witness (*n*).

Effect of amend-
ment on notice
of motion.

Under the old practice, the amendment of the bill pending notice of motion for an injunction operated as a waiver of the

(*g*) Ord. LXVI. r. 7 (*i*).

(*h*) Ord. LXVI. r. 7 (*j*).

(*i*) *Smith v. Swansea Dock Co.*, 9 Ha. App. 20; *Bird v. Lake*, 1 H. & M. 118.

(*k*) *East Lancashire Railway Co. v. Hattersley*, 8 Ha. 86; *Anderton v. Yates*, 15 Jur. 833; *Munro v.*

Wivenhoe, &c., Railway Co., 4 D. J. & S. 726.

(*l*) *Lister v. Leather*, 3 Jur. N. S. 433.

(*m*) *Pole v. Joel*, 2 D. & J. 285; and see *Court v. Barr*, 2 Rus. 163 and see also Ord. LVIII. r. 4.

(*n*) *Bird v. Lake*, 1 H. & M. 111.

notice (o). A fresh notice was necessary on the amended bill (p). If the plaintiff desired to amend his bill pending notice of motion, he had to apply specially by summons to amend without prejudice to the notice of motion (q). Leave might be had to amend even where a general demurrer to the bill was allowed (r). The same rule prevails under the new practice. In *Caldwell v. Pagham Harbour, &c., Company* (s), an action was by leave turned into an information and action without prejudice to a pending notice of motion for an injunction.

Chap. XXIII.
Sect. 1.

If the sole plaintiff or (if there are more than one) all the plaintiffs are resident out of the jurisdiction, any defendant to the action may before he takes any proceedings in the action require the plaintiff or plaintiffs to give security for costs (t). A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction (u). But where a plaintiff resides in Scotland or Ireland security will not be required (x). Moreover, security for costs will not be ordered if the plaintiff has property within the jurisdiction available for execution and of sufficient amount to satisfy the costs he may be ordered to pay (y).

Security for
costs.

If on the hearing of a motion the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or a judge may either dismiss the motion or adjourn the hearing thereof in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (z).

Hearing of
motion.

(o) *Martin v. Fust*, 8 Sim. 199;
Houthwaite v. Rippon, 1 Beav. 54;
Monypenny v. —, 1 W. R. 99.

(p) *London and Blackwall Railway Co. v. Limehouse Board of Works*, 3 K. & J. 123.

(q) *Martin v. Fust*, 8 Sim. 199;
Child v. Douglas, Kay, 560.

(r) *Smith v. Dixon*, 12 W. R. 934.
See *Rawlings v. Lambert*, 1 J. & H. 458.

(s) 2 C. D. 221.

(t) *Republic of Costa Rica v. Erlanger*, 3 C. D. 62; *Re Percy and Kelly Mining Co.*, 2 C. D. 531;
Crozat v. Brogden, (1894) 2 Q. B. 30 (C. A.).

(u) Ord. LXV. r. 6A.

(x) *Fontaine's Case*, 41 C. D. 118 (C. A.).

(y) *In re Apollinaris Co.'s Trade Marks*, (1891) 1 Ch. p. 3 (C. A.).

(z) Ord. LII. 6.

Chap. XXIII.
 Sect. 1.

Whether or not the Court will grant an application for an interlocutory injunction depends on the merits as collected from the affidavits. If a sufficient *prima facie* case be made out, the Court will consider the case sufficiently proved, unless the defendant files an affidavit denying it (a). The affidavit must traverse all the facts on which the plaintiff's equity depends. A mere general denial is not sufficient (b). If the affidavits of the plaintiff and the defendant are altogether conflicting (c), or if the balance of evidence is in favour of the defendant, the motion may be dismissed or ordered to stand over. The Court or a judge may on the application of either party order the attendance for cross-examination of the person making the affidavit (d).

But the Court has a discretionary power of acting upon such evidence as may be before it at the time of the application, and as may appear necessary to meet the justice of the case. The Court will not allow a motion to stand over in order to allow witnesses to be examined, if it is satisfied that the application is made for the purpose of creating delay (e), or that the evidence is sufficient to enable it to deal satisfactorily with the motion (f).

Case made out
 must correspond
 with allegations
 of statement
 of claim.

If a statement of claim has been delivered, the case made out by the affidavits on the motion must correspond with the allegations in the statement of claim (g). If a man brings prominently forward and relies upon a given case, the Court will not allow him, if he should fail in that case, to spell out another and say he might have framed his case so as to show a title to the relief asked (h). A man

(a) *Potts v. Potts*, 3 L. J. Ch. 176; *Bell v. Wilson*, 34 L. J. Ch. 572.

(b) *Pyecroft v. Pyecroft*, 2 Sm. & G. 326. See *Denys v. Locock*, 3 M. & C. 205; *Palin v. Gathercole*, 1 Coll. 565.

(c) *De Tastet v. Bordenave*, Jac. 516; *Sanster v. Foster*, Cr. & Ph. 302; *M'Curdy v. Noak*, 17 L. J. Ch. 165.

(d) Ord. XXXVIII. rr. 1, 28, 29; *Edwards v. Spaight*, 2 J. & H. 617; *Singer Sewing Machine Manufacturing Co. v. Wilson*, 2 H. & M. 584.

(e) *Normunville v. Stanning*, 10 Ha. App. 20.

(f) *Mayer v. Spence*, 1 J. & H. 87.

(g) *Butts v. Matthews*, 5 L. J. Ch. N. S. 134; *Burton v. Blakemore*, 2 Jur. 1062.

(h) *Whitworth v. Gaugain*, Cr. & Ph. 325; *Castelli v. Cook*, 7 Ha. 89.

who complains of injury of a peculiar and special kind cannot be allowed to give evidence of another injury of a different kind (i). An injunction is only granted on a specific case. The Court never grants injunctions on general complaints (k).

Chap. XXIII.
Sect. 1.

A motion cannot be made by the plaintiff for an injunction where the statement of claim contains scandalous matter, until the scandalous matter is expunged (o).

Instead of issuing an injunction in the first instance the Court will often grant an *interim* order in the nature of an injunction, by which the defendant is restrained until after a particular day named. The usual practice is to extend the order over the next motion day, in order that the plaintiff may serve, by leave of the Court, the defendant with notice of motion for an injunction for that day. There is, however, no fixed rule on the subject. If it appear that the defendant would be oppressed by extending the order over the whole of the next motion day, the Court will either name a day short of that day, giving the plaintiff leave to serve the defendant with notice of motion for an injunction for that day; or else the Court will extend the order over the next motion day, but give the defendant leave to move sooner to discharge the order on notice, with liberty to the plaintiff to move simultaneously for an injunction (p).

In many respects there is a convenience in proceeding by *interim* order instead of granting an injunction. Among other conveniences the defendant is not put to the necessity of coming to the Court to discharge the order (q). Where an *interim* order is granted over the next motion day or until further order, it signifies that the injunction may be dissolved

(i) *Hertz v. Union Bank of London*, 1 Jur. N. S. 127; and see ib. 723.

Att.-Gen. v. Grocers' Co., 1 Keen, 506; *Jones v. Latimer*, 1 Jur. 980; *Custelli v. Cook*, 7 Ha. 89.

(k) *Hertz v. Union Bank of London*, 1 Jur. N. S. 127; *Burdett v. Hay*, 4 D. J. & S. 41; *Munro v. Wivenhoe, &c., Railway Co.*,

(o) *Davenport v. Davenport*, 6 Madd. 251.

(p) *Fraser v. Whalley*, 2 H. & M. 10. See, as to form of order, 1 Set. 518.

(q) *Fuller v. Taylor*, 32 L. J. Ch. 376.

Chap. XXIII.
Sect. 1.

before that day. It does not mean that the injunction is to go on after that day or until further order, but that it is to stop earlier if the Court shall order (r). *Interim* orders are generally granted upon *ex parte* application, but they may be granted where the motion is upon notice. Where the application is *ex parte* it is necessary that the Court should be informed of all material facts (t).

Where an *interim* order is sought, there should be no delay in making the application. If there has been delay, the Court will not grant the application, but may give the plaintiff leave to serve short notice of motion for a day fixed, notwithstanding appearance not entered (x).

Where an *interim* order has been obtained, and simultaneous applications are made on the part of the plaintiff for an injunction in the terms of the order, and on the part of the defendant to discharge the order, the plaintiff has a right to begin (y).

On the hearing of the motion the plaintiff is usually satisfied if the defendant gives an undertaking in the terms of the notice of motion, the plaintiff on his part giving the usual undertaking in damages (z).

Saving a motion.

The motion, if not brought on upon the day for which notice has been given, should be saved. If it is neither brought on nor saved it will be treated as abandoned (a); and in such case the respondent may apply (not later than the next seal day) for the costs of the motion (b). The motion may be saved at any time before the Court rises, although the motions may have been finished (d).

(r) *Bolton v. London School Board*,
7 C. D. 771.

(t) See *ante*, pp. 557, 568; and
see *Fuller v. Taylor*, 32 L. J. Ch.
376.

(x) *Greer v. Bristol Tanning Co.*,
2 Pat. Ca. Rep. 268.

(y) *Fraser v. Whalley*, 2 H. & M.
10.

(z) As to the undertaking in
damages, see *post*, pp. 567—569.

(a) *Cuthbert v. Fane*, 1 Jur.
890; *Turner v. Turner*, 15 Jur.
1165; *Re Banwen Iron Co.*, 17
Jur. 127.

(b) *Woodcock v. Oxford, &c.,
Railway Co.*, 10 Ha. App. 54; Dan.
Ch. Pr. 1315.

(d) *Cass v. Bailey*, Smith, Ch. Pr.
248 n.; *Yapp v. Williams*, W. N.
(1901), p. 91.

Upon the motion being made, if a sufficient case for the motion is made out upon the plaintiff's affidavits, and the defendant does not appear, the application is granted on affidavit of service (e). The order which is made on affidavit of service is in the terms of the notice. The order is liable to be discharged if there be any irregularity in the notice (f), or affidavit (g) on which it is founded, or if it adds to (h) or departs from the terms of the notice (i).

Chap. XXIII.
Sect. 1.

Order made on affidavit of service, if defendant does not appear.

Where an interlocutory injunction or an *interim* restraining order is applied for, the Court will require the plaintiff, as a condition of its interference in his favour, to enter into an undertaking to abide by any order the Court may make as to damages. The undertaking was formerly required only in cases where the application was *ex parte*, but the present practice is to require the undertaking as well, where the motion is on notice, as where it is *ex parte* (k). If the plaintiff is not within the jurisdiction the undertaking of some responsible person within the jurisdiction is required (l). An undertaking as to damages can be given by a married woman (m); even though she has not sufficient separate estate to satisfy the damages the opposite party may sustain by the injunction (n).

Undertaking as to damages.

In the case of Joint Stock Companies or Corporations the practice used to be that an undertaking in damages must be given by a director or other officer of the company, who was required to sign the Registrar's book, the undertaking of counsel on behalf of the company not being deemed sufficient (o). But this practice has been much broken into of

(e) *Davidson v. Leslie*, 9 Beav. 490, *ante*, p. 23. See, as to form of order, 1 Set. 518, 522.

(f) *Moody v. Heberd*, 11 Jur. 491. (l) *Hamilton v. Board*, 1 N. R. 379; 1 Set. 522.

(g) *Salomon v. Stalman*, 4 Beav. 243. (m) *Hunt v. Hunt*, W. N. (1884) 243, 54 L. J. Ch. 289; *Re Prynn*, W. N. (1885) 144.

(h) *Pratt v. Walker*, 19 Beav. 261; *Ex parte Carew*, 23 L. J. Ch. 761. (n) *Pike v. Cuve*, 60 L. T. 47; 62 L. J. Ch. 937.

(i) *Hutton v. Hepworth*, 6 Ha. 315. (o) *Anglo-Danubian, &c., Co. v. Rugerson*, 10 Jur. N. S. 87; and see

(k) *Graham v. Campbell*, 7 C. D.

Chap. XXIII.
Sect. 1.

late years (*p*); and it seems now that in the case of a public body, such as a local board, the undertaking of counsel on behalf of the corporation is sufficient, and that the same rule holds in the case of a Limited Company, at all events if it is not insolvent (*q*). Where a company in liquidation obtains an injunction the undertaking in damages must be given by the liquidator or some other responsible person (*r*).

Undertaking in
damages—when
dispensed with.

In an action for alleged infringement of a patent, the defendants having obtained an injunction restraining the plaintiff “until judgment in the action” from issuing advertisements threatening legal proceedings, it was held that the defendants were not bound to give an undertaking as to damages, the order not being one which it was intended that the Court should in any way review at the trial of the action (*s*). In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the Court will not as a general rule require an undertaking in damages to be given (*t*); but it is otherwise where a Secretary of State is the party applying for an injunction (*u*).

Undertaking—
how given.

The undertaking is ordinarily given by counsel on behalf of the party for whom he appears, or by parties appearing in person, and forms part of the order; but where the order is granted in vacation without the attendance of counsel, the undertaking is inserted in the Registrar’s book, and signed by the plaintiff or his solicitor (*x*). If the undertaking is entered into by a man who is a stranger to the cause, he is required to sign the Registrar’s book (*y*). The Court may, however, upon

East Molesey Local Board v. Lambeth Waterworks Co., (1892) 3 Ch. p. 300.

(*p*) (1892) 3 Ch. p. 300.

(*q*) *East Molesey Local Board v. Lambeth Waterworks Co.*, *supra*; *Manchester Banking Co. v. Parkinson*, 60 L. T. 47.

(*r*) *Westminster Association v. Upward*, 24 Sol. Jo. 690.

(*s*) *Fenner v. Wilson*, (1893) 2

Ch. 656, 659.

(*t*) *Att.-Gen. v. Albany Hotel Co.*, (1896) 2 Ch. 696 (C. A.).

(*u*) *Secretary of State for War v. Chubb*, 43 L. T. 83; and see (1896) 2 Ch. p. 704.

(*x*) 1 Set. 522; *Walker v. Brown*, 29 Sol. Jo. 435.

(*y*) *Gurney v. Behrends*, 9 Ha. App. 89.

a proper application, allow the undertaking to be sent by post and filed instead of the party signing the Registrar's book (z). Chap. XXIII.
Sect. 1.

The undertaking remains in force although the action is dismissed (a), and the Court at the hearing determines that the plaintiff is not entitled to an injunction. The defendant is entitled to the benefit of the undertaking even though it should be decided that the injunction was wrongly granted owing to the mistake of the Court itself (b).

The Court, however, has no power to compel a party applying for an injunction to give an undertaking as to damages; but if the applicant refuses to give the undertaking in a case in which the Court considers that it ought to be given, the order for an injunction will not be made, or if pronounced it will not be drawn up (c). Court cannot
compel under-
taking to be
given.

The undertaking in damages is not confined to the damages which the persons restrained by the injunction may sustain, but applies to damages which any of the opposite parties in the action may sustain, although one or more only are restrained (d). Extent of
undertaking.

As, on the one hand, the Court may require the plaintiff, as the condition of its interference, in his favour, to enter into an undertaking as to damages, or in some cases (e.g., where it is sought to restrain a landlord from distraining for rent alleged to be due (e), or to restrain a mortgagee from selling (f)), to pay money into Court; so, on the other hand, it may require the defendant to enter into terms as a condition of withholding an injunction (g). Terms imposed
on applications
for injunctions.

(z) *Pacific Steam Navigation Co. v. Gibbs*, 14 W. R. 218. (C. A.); *Att.-Gen. v. Albany Hotel Co.*, (1896) 2 Ch. 700.

(a) *Newby v. Harrison*, 3 D. F. & J. 290. (d) *Tucker v. New Brunswick Trading Co.*, *supra*.

(b) *Griffith v. Blake*, 27 C. D. 475; *Hunt v. Hunt*, 54 L. J. Ch. 289. (e) *Shaw v. Earl of Jersey*, 4 C. P. D. 359.

(c) *Tucker v. New Brunswick Trading Co.*, 44 C. D. 249, 252. (f) *Whitworth v. Rhodes*, 20 L. J. Ch. 105.

(g) *Ante*, pp. 22, 23.

Chap. XXIII.
Sect. 1.

Motion for
injunction
treated as the
trial of the
action.

A motion for an injunction may by consent be treated as the trial of the action, a time being fixed for the plaintiff to file any affidavits he may desire, and also for the defendant to file affidavits in answer, and either party being at liberty after the cause has been set down to apply to have the case advanced (*h*).

Early trial.

Whenever an application is made before trial for an injunction or other order, and on the opening of such application or at any time during the hearing thereof, it appears to the judge that the matter in controversy is one which can be most conveniently dealt with by an *early trial*, the judge may make an order for such trial accordingly, and direct such trial to be held at the next or any other Assizes for any place, if from local or other circumstances it appears convenient so to do, and in the meantime may make such order as the justice of the case may require (*i*).

Where an injunction is granted the Court will sometimes suspend its operation pending an appeal; and, on the other hand, where an injunction is refused, the Court may nevertheless prevent a fund in reference to which the injunction is claimed being dealt with pending an appeal (*k*): Order LVIII., r. 16, provides that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal may order.

Where on appeal an injunction is granted but its operation is suspended, the Court of first instance, upon subsequent application to it, has jurisdiction to extend the period of suspension (*l*).

Sect. 1 of the Judicature Act, 1894, which requires the leave of the judge or Court of Appeal to the bringing of an appeal from an interlocutory order, expressly excepts (*inter alia*) cases of granting or refusing an injunction.

(*h*) *Wilkinson v. Cummins*, 11 Ha. 343; *Aslatt v. Corporation of Southampton*, 16 C. D. 143. See *Newson v. Pender*, 27 C. D. 59.

(*i*) Ord. L. r. 1A.

(*k*) See *ante*, pp. 24, 25.

(*l*) *Shelfer v. City of London Electric Lighting Co.*, (1895) 2 Ch. 388 (C. A.).

The terms of the order granting an injunction should be such that it is quite plain what it permits and what it prohibits. An order which merely prohibits a man from doing what he has no authority to do, without showing him what are the limits of his authority, and leaves him to find out what is forbidden and what is allowed, is irregular (*m*). If, however, as sometimes happens, it is impossible for the Court to define exactly the limits of the right, an order which merely amounts to a declaration of right is not irregular (*n*). In such a case, however, the Court will state the reasons which have induced it to come to its conclusion, and the manner in which it appears to the Court that what seems an evil may be remedied (*o*).

Chap. XXIII.
Sect. 1.
Terms of the
order.

The orders pronounced by the Court upon application for interlocutory injunctions have varied at different times (*p*). Under the former practice the form usually adopted was "until the hearing of the cause." Under the present practice it is "until judgment in this action, or until further order," to show that the injunction is not to extend beyond the date when judgment is given, unless then continued, nor until judgment if discharged previously by order of the Court (*q*).

Though an injunction restraining the act complained of is claimed against the defendant alone, the order will, if necessary, be extended to his servants, workmen, and agents; and it is of course to insert these words (*r*).

An order for an injunction having been obtained, it should be drawn up, passed, and entered without delay (*s*). In cases where the matter is so urgent that the object of the injunction

Service of order
for injunction.
Notice of
injunction.

- (*m*) *Cotter v. Midland Railway Co.*, 2 Ph. 472; *Warden of Dover Harbour v. London, Chatham, and Dover Railway Co.*, 3 D. F. & J. 564; *Low v. Innes*, 4 D. J. & S. 295; *Hackett v. Baiss*, 20 Eq. 499; *Parker v. First Avenue Hotel Co.*, 24 C. D. 286.
- (*n*) *Elliott v. North Eastern Railway Co.*, 10 H. L. 333; *North Eastern Railway Co. v. Crossland*, 2 J. & H. 565; 4 D. F. & J. 550.
- (*o*) *Att.-Gen. v. London and South Western Railway Co.*, 3 De G. & S. 439, 444, *per* Knight-Bruce, V.-C.
- (*p*) *Lane v. Newdigate*, 10 Ves. 192.
- (*q*) 1 Set. 521.
- (*r*) 1 Set. 521.
- (*s*) See *Buteman v. Wyatt*, 11 Beav. 587.

Chap. XXIII.
Sect. 1.

might be defeated if the party were bound to wait till the order could be passed, the practice is to serve the party personally with notice in writing that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices, or else to procure a transcript of the minutes of the order signed by the registrar, and to serve the same personally by delivering a copy of it, showing at the same time the original transcript so signed (*t*). In country cases the terms of an injunction are usually communicated, as soon as it is granted, by telegraph to an agent, who prepares therefrom and serves formal notice of the order (*u*).

Service of
restraining
order.

The order when drawn up should be served, and such service should be personal (*x*), and is effected by delivering to or leaving with the person enjoined a true copy of the order indorsed in the manner before mentioned, and at the same time exhibiting to him an authenticated office copy thereof (*y*). If it can be satisfactorily made to appear that the defendant is keeping out of the way, the Court may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement or otherwise, as may be just (*z*).

Substituted
service.

Costs of motion.

The Court has full jurisdiction to deal, at its discretion, with the costs of a motion for an injunction on notice, at the time of the application (*a*). But inasmuch as it may ultimately turn out that the merits of the case are different from what they appear to be at the time of the application, the usual course of the Court is to order that the costs of the application shall be costs in the cause (*b*). As

(*t*) *Kimpton v. Eve*, 2 V. & B. 349; *Vansandau v. Rose*, 2 J. & W. 264; *M'Neill v. Garratt*, Cr. & Ph. 98; *Gooch v. Marshall*, 8 W. R. 410.

(*u*) Dan. Ch. Pr. 1368, n.; and see *Ex parte Langley*, 13 C. D. 110 (C. A.); *D. v. A. & Co.*, (1900) 1 Ch. p. 487.

(*x*) *Vansandau v. Rose*, 2 J. & W.

264; *Gooch v. Marshall*, 8 W. R. 410. See, however, *post*, p. 594.

(*y*) Ord. LXVII. 1.

(*z*) *Ib.* 6.

(*a*) *Pearce v. Wycombe Railway Co.*, 17 Jur. 660.

(*b*) *Maitland v. Backhouse*, 17 L. J. Ch. 127, *per* Lord Cottenham. See *Coles v. Sims*, 5 De G. M. & G. p. 11.

a rule, no order for payment of costs will be made on an *ex parte* application (c). Chap. XXIII.
Sect. 1.

Where upon an interlocutory application in an action the plaintiff obtains the relief which he asks, and there is not any question remaining open to be decided, he should make an application to the defendant to have the costs disposed of on motion (c).

A man whose legal right has been invaded is under no obligation to make an application to the defendant before bringing his action for an injunction (d). He may on discovering that the defendant has violated his legal right issue a writ and serve defendant with notice of motion for an injunction. He is not under any obligation to give the defendant notice and ascertain whether he will do all that is needed. It is immaterial that the defendant may have been acting in the matter without any fraudulent intent. The defendant must pay the costs of the motion (e). Notice before
action not
necessary.

If, however, the plaintiff give notice to the defendant that he is violating his legal right and the defendant on the receipt of the notice, offers to enter into an undertaking or submit to an injunction, the plaintiff if he proceeds with the action will not have his subsequent costs (f). But if the defendant on the receipt of the notice do not offer to the plaintiff the redress to which he is entitled, the plaintiff may go on with the action and will be entitled to his costs (g). Costs where
defendant has
offered to
submit.

In dealing with the costs of a motion, the Court is generally guided by the following rules laid down by Sir John Leach in 1 Sim. & St. 357:—1. That the party making a successful motion is entitled to his costs, as costs in the cause; but the party opposing it is not entitled to his costs, as costs Rules laid down
by Sir John
Leach as to
costs.

(c) *Sonnenschein v. Barnard*, 57 L. T. N. S. 712. 630.

(d) *Burgess v. Hill*, 26 Beav. 244. (f) See *Upman v. Forester*, 24

(e) *Upman v. Forester*, 24 C. D. 231; and *Jenkins v. Hope*,

231; *Witman v. Oppenheim*, 27 (1896) 1 Ch. 278.

C. D. 260. See, however, *American* (g) *Cooper v. Whittingham*, 15

Tobacco Co. v. Guest, (1892) 1 Ch. C. D. 506. But see *Walter v.*

Steinkopff, (1892) 3 Ch. 489.

Chap. XXIII.
Sect. 1.

in the cause. 2. That the party making a motion which fails is not entitled to his costs, as costs in the cause; but the party opposing it is entitled to his costs, as costs in the cause. 3. That where a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause (*h*).

But there are several exceptions to these rules. If a defendant unsuccessfully resists a motion for an injunction but succeeds at the hearing and gets the costs of the action, his costs of the motion will, notwithstanding the first of the above rules, be costs in the cause (*i*). So also where the motion for an injunction stands over and the action is ultimately dismissed with costs (*k*). So also where the plaintiff, who was ultimately successful, was ordered to pay the costs of an action up to a certain day, it was held that the usual rules did not apply and that he must pay the costs of a motion to obtain and dissolve an injunction made prior to that day (*l*).

Other exceptions to Sir John Leach's rule occur:—1. Where on the merits the costs are reserved till the trial. 2. Where the motion is rendered necessary by the default of the moving party or for some other reason he is asking for an indulgence. 3. Where the motion is rendered necessary by the opposite party's default. 4. Where the motion is irregular (*m*).

When the costs are reserved, they should be reserved till the trial or further order and not to the trial simply; because in the latter case no order can be made relating to them unless

(*h*) See *Marsack v. Reeves*, 6 Madd. 108, 109; *Great Western Railway v. Oxford, Worcester, &c., Railway Co.*, 5 De G. & S. 439; *Hind v. Whitmore*, 2 K. & J. 463. When the motion for an injunction is ordered to stand over till the hearing, but no order is made as to the costs, and at the hearing the plaintiff gets a decree in his favour, the motion is substantially a successful motion.

Mounsey v. Lord Lonsdale, 6 Ch. 143.

(*i*) *Stevens v. Keating*, 1 Mac. & G. 659.

(*k*) *Betts v. Clifford*, 1 J. & H. 75; *Corcoran v. Witt*, 13 Eq. 54.

(*l*) *Webster v. Manby*, 4 Ch. 372.

(*m*) See Morg. & Wurtz. on Costs, 49—57.

the cause is actually brought to trial (*n*). Where a motion has been ordered to stand to the trial, and is not then mentioned to the judge, the costs of such motion are treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. Where, however, a motion has been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or allowed on taxation, without the special direction of the judge (*o*).

Where the Court orders a motion to stand over till the trial, it simply reserves to itself the power of dealing with the costs of it differently from the costs in the cause (*p*).

If both parties are in the wrong, no costs will be given to either side (*q*). Parties coming for an injunction *ex parte* will even, if successful, have to pay costs unless they state their case fully and fairly to the Court (*r*).

If the notice of motion is withdrawn or the party giving notice does not appear at the hearing, he must pay to the respondent the costs incurred by him (*s*).

In order to obtain the costs of an abandoned motion, they must be applied for not later than the next motion day after that for which the notice of motion was given, otherwise they will be refused (*t*).

If, on appeal from a motion, the Court of Appeal is of opinion that the injunction was improperly granted in the Court below, the order made will be reversed with the costs incurred in the original motion (*u*).

The costs of the motion may be given, though they are not

(*n*) *Rumbold v. Forteach*, 4 Jur. N. S. 608; see *Gardner v. Marshall*, 14 Sim. 575; *Jones v. Batten*, 10 Ha. App. 11; see further *Morg. & Wurtz. on Costs*, 50.

(*o*) *British Natural, &c., Association v. Bywater*, (1897) 2 Ch. 531.

(*p*) *Singer v. Audsley*, 13 Eq. 401.

(*q*) *Hilliard v. Hanson*, 21 C. D. 69; *Aylwin v. Evans*, 47 L. T. N. S. 568.

(*r*) *Holden v. Waterlow*, 15 W. R.

139.

(*s*) *Berry v. Exchange Trading Co.*, 1 Q. B. D. 77.

(*t*) *Woodcock v. Oxford, &c., Railway Co.*, 17 Jur. 33; *Eccles v. Liverpool Borough Bank*, John. 402. See as to costs of abandoned motion, *Aitken v. Dunbar*, 25 W. R. 366.

(*u*) *Beardmer v. London and North Western Railway Co.*, 13 Jur. 327, 1 H. & Tw. 161.

Chap. XXIII.
Sect. 1.

asked for in the notice of motion (x); but not if the party served does not appear (y).

In any case where the Court shall think fit to award costs to any party, the Court may by the order direct taxation of the costs of such party and payment of a proportion thereof, or direct payment of a sum in lieu of taxed costs and direct by and to whom the same shall be paid (z).

As to the discretion of the Court with regard to costs, see Ord. LXV., r. 1 and the Judicature Act, 1890, s. 5.

In regard to actions against persons entitled to the benefit of the Public Authorities Protection Act, 1893, it has been held that the word "action" in that statute includes all actions in the Chancery Division for an injunction, whether damages are claimed in addition or not; and in any such action, therefore, judgment (a) for the defendants carries the right to an order for costs to be taxed as between solicitor and client (aa).

Trial of questions
on which right
to injunction
depends.

Parties seeking relief by way of injunction could not under the old procedure have their case wholly disposed of by the Court of Chancery, but were often obliged to go to a court of law to have other points determined upon which their rights depended. The course of the Court of Chancery upon the application for an injunction was either to grant the injunction, putting the plaintiff to establish his right at law within a given time or to retain the bill with liberty to bring an action. If an action at law could not, in the opinion of the Court, be framed so as to meet the question, it was the course of the Court to direct an issue where it saw clearly what the issue in the case was. Under the Judicature Act, 1873, however, every branch of the High Court of Justice has jurisdiction to decide

(x) *Clarke v. Jaques*, 11 Beav. 623; *Powell v. Cockerell*, 4 Ha. 572; *Pearce v. Wycombe Railway Co.*, 17 Jur. 660.

(y) *Pratt v. Walker*, 19 Beav. 261.

(z) Ord. LXV. r. 23. As to direct-
ing in what proportions costs shall
be borne, see *In re Pollard*, W. N.
(1902) 49.

(a) See *Fielding v. Morley Cor-*

poration, (1899) 1 Ch. 1 (C. A.);
*Smith v. Northleach District Coun-
cil*, (1902) 1 Ch. 197.

(aa) *Harrop v. Mayor of Osselt*,
(1898) 1 Ch. 525. As to the power of
the Court to deprive persons coming
within the protection of 56 & 57
Vict. c. 61, of costs for good cause,
see *Bostock v. Ramsey Urban District
Council*, (1900) 2 Q. B. 616 (C. A.).

all questions of law and fact on the determination of which the title to relief by way of injunction depends, and to grant an injunction when a proper case for that relief is made out.

Chap. XXIII.
Sect. 1.

Causes or matters assigned by the Judicature Act, 1873, to the Chancery Division are to be tried by a judge without a jury, unless the Court or a judge shall otherwise order (*b*).

The Court has in such cases a discretion to direct a trial with a jury; and where a judge has in the exercise of such discretion, directed a trial by a jury, the Court of Appeal will not interfere with the discretion of the judge, unless it is clear that his discretion has been wrongly exercised (*c*).

Under this rule (*cc*) the Court will not order an action to be tried before a jury unless there is a simple question of fact, the verdict upon which would decide the issue in the action (*d*): and even in such a case it is a matter for the discretion of the judge whether the case should be heard before a jury (*e*).

The Court or a judge may, if it appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act could, without any consent of parties, have been tried without a jury (*f*).

The words "question of fact" in this rule refer to a question of fact upon which the title to relief depends, and not a question as to the amount of damages (*g*).

The Court of Appeal will not interfere with the discretion of the judge in ordering a trial without a jury unless it is satisfied on very clear grounds that the discretion of the judge has not been correctly exercised (*h*).

The Court or a judge may direct the trial without a jury of

- | | |
|--|---|
| (b) Ord. XXXVI. r. 3. | W. R. 368. |
| (c) <i>Hunt v. Chambers</i> , 20 C. D. p. 369; and see <i>Ormerod v. Todmorden Mill Co.</i> , 8 Q. B. D. 664 (C. A.); <i>Jenkins v. Bushby</i> , (1891) 1 Ch. 484 (C. A.); and the judgment of Fry, L.J., in <i>Att.-Gen. v. Vyner</i> , 38 W. R. 195. | (e) <i>Gardner v. Jay</i> , 29 C. D. 50; <i>Sheppard v. Gilmore</i> , 34 W. R. 179. |
| (cc) Rule 3 of Ord. XXXVI. | (f) Ord. XXXVI. r. 4; see <i>Bordier v. Burrell</i> , 5 C. D. 514; <i>Coote v. Ingram</i> , 35 C. D. 117. |
| (d) <i>Cardinall v. Cardinall</i> , 25 C. D. 772; <i>Moss v. Bradburn</i> , 32 | (g) <i>Fennessy v. Clark</i> , 37 C. D. 184, 187 (C. A.). |
| | (h) <i>Burgoine v. Moordaff</i> , 8 P. D. 208 (C. A.). |

Chap. XXIII.
Sect. 1.

any cause, matter, or issue requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury (i).

This rule merely preserves the old practice of the Common Law Courts. There was always power in such actions as are referred to in the rule to order a trial without a jury. The rule has no application to actions which apart from it are properly triable without a jury (k).

In any other cause or matter, upon the application (within ten days after notice of trial has been given) of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury (l).

The words "other cause or matter" mean other than the causes or matters which are not provided for by the previous rules (m). In cases which under the former practice could, without consent, be tried without a jury the Court has a discretion as to ordering a trial with a jury, and those who ask the judge to exercise the discretion must show the judge a reason for his doing so (n); and in the exercise of this discretion the Court will not allow the matter to go before a jury unless in cases where there is a question to be decided which may be conveniently and better decided by a jury than by the Court without a jury (o).

In every cause or matter, unless under the provisions of Ord. XXXVI. r. 6, a trial with a jury is ordered, or under r. 2 of that Order either party has signified a desire to have a trial with a jury, the mode of trial is to be by a judge without a jury; provided that in any such case the Court or a judge may at any

- | | |
|--|--|
| (i) Ord. XXXVI. r. 5. | 36 W. R. 418; <i>Coote v. Ingram</i> , 35 |
| (k) <i>Jenkins v. Bushby</i> , (1891) 1 | C. D. 117. |
| Ch. 490, <i>per</i> Lindley, L.J. | (o) <i>Ruston v. Tobin</i> , 10 C. D. |
| (l) Ord. XXXVI. r. 6. | 563, <i>per</i> Malins, V.-C. See <i>Sugg v.</i> |
| (m) <i>I.e.</i> , rules 3, 4 and 5 of Ord. | <i>Silber</i> , 1 Q. B. D. 362; <i>West v.</i> |
| XXXVI.; see <i>Baring v. N. W. of</i> | <i>White</i> , 4 C. D. 631; <i>Powell v.</i> |
| <i>Uruguay Railway Co.</i> , (1893) 2 | <i>Williams</i> , 12 C. D. 234; <i>Clarke v.</i> |
| Q. B. 406, 411 (C. A.). | <i>Skipper</i> , 21 C. D. 134; <i>Bordier</i> |
| (n) <i>The Temple Bar</i> , 11 P. D. 6; | <i>v. Burrell</i> , 5 C. D. 514; <i>Petar v.</i> |
| <i>Fanshaw v. London, &c., Dairy Co.</i> , | <i>Laily</i> , W. N. (1881) 22. |

time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors (*p*).

Chap. XXIII.
Sect. 1.

This rule applies to all actions in the High Court, except those in which either party has a right to trial by jury, and has insisted on such right in the mode prescribed by Rules 2 or 6 (*q*). The rule allows a judge in his discretion to direct that a party may have a jury in cases in which parties had formerly no such right (*r*).

The Arbitration Act, 1889, provides that, subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee (*s*). The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect (*t*).

This Act also provides (*u*) that in any cause or matter (other than a criminal proceeding by the Crown)—(1) If all the parties interested who are not under disability consent; or (2) if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court through its ordinary officers; or (3) if the question in dispute consists wholly or in part of matters of account, the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

An action in the Chancery Division, as well as an issue or question therein, may be ordered to be tried at the assizes (*x*)

Trial of action
at assizes.

(*p*) Ord. XXXVI. r. 7 (*a*).

Co., 36 W. R. 418.

(*q*) *Jenkins v. Bushby*, (1891) 1 Ch. p. 490.

(*s*) Sect. 13, sub-s. 1.

(*t*) Sect. 13, sub-s. 2.

(*r*) *The Temple Bar*, 11 P. D. 6;
Coote v. Ingram, 35 C. D. 117;

(*u*) Sect. 14.

(*x*) *Wood v. Hamblet*, 6 C. D.

Fanshaw v. London, &c., Dairy 113.

Chap. XXIII.
Sect. 1.

Where in an action commenced in the Chancery Division it is expedient to have all the issues tried by a jury, and there is nothing to render it necessary that the matter should come back to the Chancery Division, the most convenient course is to transfer the action altogether to the King's Bench Division (*y*).

Scientific
evidence,
experts, &c., &c.

The Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, or other scientific persons, the better to enable any matter at once to be determined, and he may act upon the certificate of any such person (*z*). If upon the trial of an action there is such a conflict of evidence that the opinion of an independent surveyor or scientific expert becomes necessary for the Court to come to a conclusion as to questions of fact, such questions may be referred for inquiry and report to a special referee (*a*). A surveyor so appointed acts in a *quasi*-judicial capacity, and is not subject to examination as a witness (*b*).

Where a plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to refer it to an expert to report as to the best mode of abating the nuisance (*c*).

Inspection.

By Ord. L. r. 8, power is given to the Court or a judge upon the application of any party to a cause or matter, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such cause or matter, and for the purpose aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such cause or matter, and to authorise any samples to be taken or any observation to be made or experiment to be

(*y*) *Hunt v. Chambers*, 20 C. D. 365; *Mangan v. Met. Electric Supply Co.*, (1891) 2 Ch. 551 (C. A.); *Forrester v. Jones*, W. N. (1899), p. 78; and see Ord. XLIX. r. 3.

(*z*) Ord. LV. r. 19.

(*a*) *Case v. Midland Railway Co.*, 27 Beav. 247; *Cartwright v. Last*, Set. 362; *Craven v. Kay*, ib. 498;

Broder v. Saillard, 2 C. D. 695, Set. 362; *Badische v. Anilin, &c.*, *Fabrik v. Levinstein*, 24 C. D. 158, W. N. (1883) 62.

(*b*) *Broder v. Saillard*, 24 W. R. 456.

(*c*) *Att.-Gen. v. Colney Hatch Asylum*, 4 Ch. 146; see *ante*, p. 125. See, however, *post*, p. 590, note (*k*).

tried, which may be necessary or expedient for the purpose of obtaining full information or evidence (*d*). Chap. XXIII.
Sect. 1.

Under this rule the Court may grant an *interim* injunction to restrain a defendant from ceasing to pump water out of a mine in order to preserve it from injury (*e*).

An application for an order for inspection may be made by any party to the cause. It may be made after notice to the defendant at any time after the issue of the writ. If it be made by any other party, it must be made on notice to the plaintiff and after appearance by the party making the application (*f*). The application may be made by motion or summons. It is usually made on application for an interlocutory injunction, but it is immaterial at what stage of the proceedings the application is made. Application for
inspection.

Upon an application for the order the Court looks at the nature of the action, the purposes for which it is sought, and whether the case is such that the Court is authorised in making the order (*g*). If the Court is of opinion that an inspection is not necessary to enable the party who makes the application to establish his case, the order will not be granted (*h*).

The application for an order for inspection should ordinarily be on notice, but under special circumstances it may be made *ex parte* (*i*).

The Court of Chancery had no inherent power to ascertain the amount of damages sustained by reason of tortious acts unattended with profit to the wrongdoer. But the jurisdiction to give and assess damages in respect of such acts was conferred Damages.

(*d*) See as to costs, *Mitchell v. Darley Main Colliery Co.*, 10 Q. B. D. 457. As to the power of the judge before whom a cause or matter is heard, to inspect any property or thing concerning which any question may arise therein, see Ord. L. r. 4; and see *London General Omnibus Co. v. Lavell*, (1901) 1 Ch. 135 (C. A.).

(*f*) See *Lamb v. Beaumont*, 27 C. D. 356, for an order giving the plaintiff leave to enter upon the defendant's land and excavate for the purpose of inspection.

(*h*) *Barlow v. Bailey*, 18 W. R. 783, W. N. (1870) 136.

(*i*) *Hennessey v. Bohman*, W. N. (1877) 14.

(*e*) *Strelley v. Pearson*, 15 C. D. 113; and see *Polini v. Gray*, 12

Chap XXIII.
Sect. 1.

on the Court of Chancery by Lord Cairns' Act, 21 & 22 Vict. c. 27. It was declared by sect. 2 of that statute that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the same Court may award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

Though this clause of Lord Cairns' Act has been repealed by 46 & 47 Vict. c. 49, s. 3, the jurisdiction seems to be preserved by sect. 5 of the same statute (*k*). It is not, however, necessary to have recourse to Lord Cairns' Act, for the High Court of Justice has now full power under the Judicature Act, 1873, to give either an injunction or damages (*l*); and the Court's power is larger than the power it possessed under Lord Cairns' Act, for under Lord Cairns' Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could obtain damages (*m*).

Damages in lieu
of injunction.

In determining whether it shall grant an injunction or damages in lieu of an injunction, the Court exercises a discretion. But this discretion must be a judicial discretion exercised according to something like a settled rule in such a way as to prevent a man doing a wrongful act and thinking that he can pay damages for it (*n*). If the injury complained of is of a very material nature, it is contrary to the practice of the Court to give damages in lieu of an injunction (*o*). Damages may

(*k*) *Sayers v. Collyer*, 28 C. D. 578; *Greenwood v. Hornsey*, 103 (C. A.); *Dreyfus v. Peruvian Guano Co.*, 42 C. D. p. 73; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287.

(*l*) *Ib.*

(*m*) *Elmore v. Pirrie*, 57 L. T. 353, *per* Kay, J.

(*n*) *Smith v. Smith*, 20 Eq. 505; *Krehl v. Burrell*, 7 C. D. 551, 11 C. D. 146; *Holland v. Worley*, 26

C. D. 578; *Greenwood v. Hornsey*, 33 C. D. 471; *Martin v. Price*, (1894) 1 Ch. 276, 285.

(*o*) *Krehl v. Burrell*, 7 C. D. 511, 11 C. D. 146; *Holland v. Worley*, 26 C. D. 578; *Greenwood v. Hornsey*, 33 C. D. 471; *Martin v. Price*, (1894) 1 Ch. 276; *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287.

be given instead of an injunction when the following requirements are found in conjunction, viz., where the injury is: (i.) small; (ii.) capable of being estimated in money; (iii.) capable of being adequately compensated by a small sum; and (iv.) when an injunction would be oppressive (*p*).

In a case of continuing actionable nuisance, damages instead of an injunction will only be given in very exceptional circumstances (*q*); and it seems that there is no jurisdiction to give damages in respect of a threatened injury, where no wrongful act has been committed (*r*).

Acquiescence is one of those circumstances which the Court takes into consideration in deciding whether it should give damages or an injunction (*s*).

In order that damages should be an adequate substitute for an injunction, they must cover the whole area which would have been covered by the injunction. They must comprise as well the damages for wrongful acts continued up to the time of trial as for those which had taken place before the issue of the writ (*t*). If the wrongful act has come to an end before the trial, the Court has jurisdiction nevertheless to assess the whole of the damages accrued (*u*).

In a case in which an injunction was granted to restrain a trespass, it was held that as the right to the injunction depended on the fact that there was no proper compensation in damages, damages would not be awarded in addition to the injunction (*x*).

Where there is no difficulty in assessing damages, the judge will assess them at the trial, and thus save the expense of an inquiry (*y*).

(*p*) *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. p. 322.

(*q*) *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. p. 287.

(*r*) *Dreyfus v. Peruvian Guano Co.*, 43 C. D. 316 (C. A.); but see *Martin v. Price*, (1894) 1 Ch. pp. 284, 285 (C. A.).

(*s*) *Sayers v. Collyer*, 28 C. D. 103; *Shelfer v. City of London Electric*

Lighting Co., (1895) 1 Ch. p. 322.

(*t*) *Fritz v. Hobson*, 14 C. D. 543; *Chayman v. Auckland Union*, 23 Q. B. D. 294, 298; and see Ord. XXXVI. r. 58.

(*u*) *Fritz v. Hobson*, *supra*; *Davenport v. Ryland*, 1 Eq. 302.

(*x*) *Eardley v. Lord Granville*, 24 W. R. 528. *Sed quære*.

(*y*) *Crawford v. Hornsea Steam, &c., Co.*, W. N. (1876) 132; *Holland v. Worley*, 26 C. D. 587.

Chap. XXIII.
Sect. 2.

An inquiry as to damages will not be directed in addition to the account (z). Nor will an inquiry as to damages be directed where the plaintiff has opened a case of substantial injury entitling him to an injunction and damages and has failed to prove substantial injury (a). When the plaintiff fails on the merits at the trial, the defendant is entitled to an inquiry on plaintiff's undertaking as to damages sustained by him by reason of the interlocutory injunction (b); unless there are special circumstances disentitling him to such inquiry (c).

To entitle a party to damages, it is not necessary that damages should be specifically prayed for. Damages may be had under the prayer for general relief (d). A man who has brought an action for relief and damages does not lose his right to damages because performance has been obtained from the defendant before the suit comes to a hearing (e).

Appeal on
questions of
damage.

An appeal will not lie on the question of the amount of damages unless it appear that the Court below has acted on a wrong principle in arriving at such amount (f).

SECTION II.—DISSOLUTION OF INJUNCTION.

An interlocutory injunction may be dissolved at any time before judgment in the action. A defendant who wishes to have an injunction dissolved must serve the plaintiff with notice of motion for that purpose. If other parties are

(z) *De Vitre v. Betts*, L. R. 6 1018; and see *post*, sect. v. of this chapter.
H. L. 321.

(a) *Kino v. Rudkin*, 6 C. D. 165. (d) *Catton v. Wylde*, 32 Beav. 266; *Betts v. Neilson*, 3 Ch. 441; *Lady Stanley v. Lord Shrewsbury*, 19 Eq. 616.

(b) *Ib.*; *Ross v. Buxton*, W. N. (1888) 55; *Griffith v. Blake*, 27 C. D. p. 477. (e) *Cory v. Thames Iron, &c., Co.*, 11 W. R. 589.

(c) *Smith v. Day*, 21 C. D. 421; *Griffith v. Blake*, *ante*; and see (f) *Ball v. Ray*, 22 W. R. 283.
Bingley v. Marshall, 11 W. R.

interested with the applicant as co-defendants, it may be necessary to serve them also with the notice of motion (*g*). Chap. XXIII.
Sect. 2.

Where an *interim* order has been obtained by plaintiff, and simultaneous applications are made for an injunction, and to discharge the order, the plaintiff is entitled to begin (*h*).

An injunction cannot, on the motion to dissolve, be sustained on grounds not raised by the statement of claim (*i*). Nor is it competent for the plaintiff, on the motion to dissolve, to make a new case (*k*).

Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of notice of motion to dissolve, and the day named in the notice for hearing the motion (*l*). If special leave be given by the Court, the leave must be stated in the notice (*m*). The notice should be given for one of the days appropriated to the hearing of motions (*n*); but, if a case of urgency be made out, leave may be had from the Court to give notice of motion for a day not appropriated to the hearing of motions. The notice should state that the motion is with leave (*o*). The plaintiff is sometimes required by the *interim* order to undertake that he will accept short notice to discharge the order (*p*).

In cases where an injunction has been obtained *ex parte*, the Court will, where an application is made on counter-affidavits to dissolve the injunction, entertain the application immediately, and will not give the plaintiff time to file affidavits in reply, unless it shall be of opinion that justice requires that he should have time allowed him for replying to the affidavits.

The motion to dissolve should be made before the Court by which the injunction was granted (*q*). But if the cause has been transferred to another branch of the Court the application

(*g*) *Service v. Castaneda*, 9 Jur. 367.

(*h*) *Fraser v. Whalley*, 2 H. & M. 10.

(*i*) *Burdett v. Hay*, 4 D. J. & S. 41, *ante*, pp. 558, 564.

(*k*) *Barker v. North Staffordshire Railway Co.*, 5 Ra. Ca. 401.

(*l*) Ord. LII. r. 5. See p. 556.

(*m*) *Hill v. Rimmell*, 2 M. & C. 641.

(*n*) *Steedman v. Poole*, 11 Jur. 555.

(*o*) *Hill v. Rimmell*, 2 Jur. 45.

(*p*) 1 Set. 518.

(*q*) *Paredes v. Lizardi*, 9 Beav. 490. See *Hammond v. Smith*, 15

L. J. Ch. 40.

Chap. XXIII.
Sect. 2.

may be made to that branch of the Court to which the cause has become attached (*r*). Where, on appeal, an injunction was granted but its operation was suspended, it was held that an application for the further suspension of the injunction might have been properly made to the Court of first instance (*s*).

Evidence
on motion
to dissolve.

Upon motion to dissolve, the plaintiff has no right to insist that the motion shall stand over in order to give him time to cross-examine witnesses who have made affidavits for the defendant (*t*): affidavits filed in support of statements introduced by amendment after injunction granted, and tending to support the injunction, cannot be read on motion to dissolve that injunction (*u*).

Motion to
dissolve *ex parte*
injunctions.

If, on the motion to dissolve an *ex parte* injunction, it appear that the plaintiff has misstated his case, either by misrepresentation, or by the suppression of material facts, so that an injunction has been obtained which would not have been obtained if a more accurate statement of the case had been made, the injunction will be dissolved on that ground alone (*x*). The plaintiff will not be allowed to maintain it on the merits then disclosed (*y*). Nor can he be heard to say that he was not aware of the importance of the facts so misstated or concealed (*z*), or that he had forgotten them (*a*). A motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction is about to expire (*b*).

(*r*) *Sturgeon v. Hooker*, 1 De G. & S. 484.

(*s*) *Shelfer v. City of London Electric Lighting Co.*, (1895) 2 Ch. 388 (C. A.).

(*t*) *Normanville v. Stanning*, 10 Ha. App. 20.

(*u*) *Prince Albert v. Strange*, 1 Mac. & G. 25, 47.

(*x*) *Brown v. Newall*, 2 M. & C. 570; *Castelli v. Cook*, 7 Ha. 94; *Dalglisch v. Jarvie*, 2 Mac. & G. 243; *Ross v. Burton*, W. N. (1888) 55; *Boyce v. Gill*, 64 L. T. 824, W. N.

(1891), p. 108; *Schmitt v. Faulks*, W. N. (1893), p. 64.

(*y*) *Att.-Gen. v. Corporation of Liverpool*, 1 M. & C. 211; *Castelli v. Cook*, 7 Ha. 94; *Dalglisch v. Jarvie*, 2 Mac. & G. 238.

(*z*) *Dalglisch v. Jarvie*, 2 Mac. & G. 241.

(*a*) *Clifton v. Robinson*, 16 Beav. 355.

(*b*) *Wimbledon Local Board v. Croydon Sanitary Authority*, 32 C. D. 421.

But even though the affidavits on which the injunction was obtained may not have stated all the facts, there may not have been such misstatement or suppression as to lead the Court to grant the injunction (c). The plaintiff is only bound by the facts which he states, and not by his statements of the legal consequences arising from the facts stated (d). He is not bound to state facts supposed to raise some point of law in reality untenable (e). Nor, indeed, may his ignorance of the fact, that the act of which he complained was being put a stop to at the time when he applied for the injunction, amount to such a misrepresentation as to lead the Court to hold that the injunction was improperly obtained. It is enough if the facts were stated as they were shortly before the bringing of the action, and that the plaintiff was not aware of the fact at the time of the application of any further fact requiring to be stated (f).

The Court does not deal with the same severity and strictness in the case of an injunction obtained on notice, as with an injunction obtained *ex parte*; but the circumstances of the case may be such as to call upon the Court to visit the plaintiff with the same severity (g).

A man who has obtained an *ex parte* injunction which is afterwards dissolved on the ground of concealment of material facts, is not precluded from making an application for another injunction on the merits (h).

Where *ex parte* injunction dissolved, applicant may again apply.

If an injunction has been granted against two or more persons, each of them must move to dissolve. If only one of the defendants applies, the injunction will not be dissolved as against the others (i).

Who must move to dissolve.

Where a stranger to the action is affected by an injunction, he may, it seems, apply to have the injunction set aside (k).

(c) *Brown v. Newall*, 2 M. & C. 571; *Castelli v. Cook*, 7 Ha. 89, 94. (g) *Maclaren v. Stainton*, 16 Beav. 290.

(d) *Brown v. Newall*, 2 M. & C. 558. (h) *Fitch v. Rochfort*, 18 L. J. Ch. 458.

(e) *Weston v. Arnold*, 8 Ch. 1084. (i) *Bramwell v. Halcomb*, 3 M. & C. 737, 741.

(f) *Semple v. London and Birmingham Railway Co.*, 1 Ra. Ca. 493. (k) *Bourbaud v. Bourbaud*, 12 W. R. 1024.

Chap. XXIII.
Sect. 2.

Motion to
discharge an
order.

The Court will not, on an application to discharge an order for irregularity, sustain it on the merits (*l*). Where an order has been made on motion and affidavit of service in the absence of parties, the Court will, on proper application, give the absent party leave to move to discharge (*m*). An injunction granted on affidavit will be discharged, if the plaintiff fails to appear before an examiner to be cross-examined on his affidavits (*n*). So also, where an *ex parte* injunction was granted upon the plaintiff undertaking to amend the writ by adding a party as co-plaintiff and upon the usual undertaking in damages and there was unreasonable delay in making the amendment, the injunction was dissolved (*o*).

Irregularity of
injunction may
be waived.

Although an injunction may have issued, irregularly, the irregularity may be waived by any act of the defendant affirming the subsistence of a regular injunction (*p*).

Acquiescence
under the order.

After long acquiescence under an order for an injunction, an application for dissolving it will not be readily entertained (*q*). Where an order for an injunction had been made in a case where the Court had no jurisdiction, Lord Westbury would not discharge the injunction on the ground of the acquiescence of the defendant, but allowed it to stand, on the plaintiff entering into a certain undertaking (*r*).

Consent to an
injunction
cannot be
withdrawn.

A party who has deliberately consented to a perpetual injunction cannot be permitted to withdraw his consent merely because he has subsequently discovered that he might have a good defence to the action (*s*).

(*l*) *Brooks v. Purton*, 4 Beav. 494; *St. Victor v. Devereux*, 6 Beav. 584.

(*m*) *Mapp v. Elcock*, 22 L. J. Ch. 707.

(*n*) *O'Callaghan v. Barnad*, W. N. (1875) 37.

(*o*) *The Spanish General Agency Corporation v. The Spanish Corporation, Ltd.*, W. N. (1890), p. 158.

(*p*) *Travers v. Lord Stafford*, 2 Ves. 20; *Vipan v. Mortlock*, 2 Mer. 476.

(*q*) *Glascott v. Lang*, 3 M. & C.

451; *Bickford v. Skewes*, 4 M. & C. 500; *Jennings v. Brighton, &c.. Sewers Board*, 4 D. J. & S. 747 n.; *Bell v. Hull and Selby Railway Co.* 1 Ra. Ca. 616.

(*r*) *Cardinall v. Molyneux*, 4 D. F. & J. 117, 123.

(*s*) *Elsas v. Williams*, 54 L. J. Ch. 336, 52 L. T. N. S. 39. See as to judgments by consent, *Ainsworth v. Wilding*, (1896) 1 Ch. 673; *Wilding v. Sanderson*, (1897) 2 Ch. 534 (C. A.).

SECTION III.—EFFECT OF CERTAIN PROCEEDINGS ON
INJUNCTIONS.

Under the former procedure an injunction was not dissolved Abatement. by the abatement of the suit in which it had been granted (t). Under the present practice an action does not become abated by reason of the marriage or death or bankruptcy of any of the parties, if the cause of action survive or continue; but an order may be obtained that the husband, personal representative, trustee or other successor in interest of such party be made a party to the action, or be served with notice thereof (u).

A plaintiff may, after obtaining an injunction, obtain an order to amend without prejudice to the injunction; and the injunction, even if not expressly saved, will be unaffected, unless the record is changed, or the equity on which the injunction was obtained is displaced or materially altered by the amendment (x). Effect of amendment on injunction

If the action is dismissed the injunction is *ipso facto* discharged (y). A motion or order for its dissolution is not necessary. But the dismissal of the action does not prevent the plaintiff from bringing another for the same purpose under a different state of circumstances (z), or upon new facts (a). Dismissal of action.

If a motion for an injunction has been refused with costs, a second motion for the same object cannot be made until those costs have been either paid or secured by payment into Court (b).

(t) *Ferrand v. Hamer*, 4 M. & C. 147.

(u) Ord. XVII. r. 2.

(x) *Harvey v. Hall*, 11 Eq. 3.

(y) *Green v. Pulsford*, 2 Beav. 70.

(z) *Mayor of Liverpool v. Chorley Waterworks Co.*, 2 D. M. & G. 852; *Castelli v. Cook*, 7 Ha. 89, 99.

(a) *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G. 304, 341.

(b) *Oldfield v. Cobbett*, 12 Beav. 91; *Burdell v. Hay*, 33 Beav. 189.

As to staying proceedings until costs of former proceedings for a similar object have been paid, see *Martin v. Earl Beauchamp*, 25 C. D. 12 (C. A.); *M'Cabe v. Bank of Ireland*, 14 A. C. 412; and see also Ord. XXVI. r. 4, and the Vexatious Actions Act, 1896.

An injunction which has been granted upon an interlocutory application is superseded by the judgment in the action. If it is intended that it should remain in force it must be expressly continued. Injunctions are continued after the trial of the action either provisionally or permanently. Injunctions are made perpetual at the trial for the purpose of protecting the plaintiff, when his right has been established, by putting an end to harassing and vexatious litigation, and preventing the repetition of illegal and unauthorised acts; or wherever a perpetual injunction is the appropriate remedy to give the plaintiff the complete relief to which he may have shown himself entitled (c).

An injunction will be granted on judgment in the action when it is necessary for the purposes of complete justice (d), although it is not claimed in the writ of summons (e).

As a general rule an injunction can only be made perpetual at judgment in the action (f). But an injunction may by consent be made perpetual on motion (g).

Where mischief
has ceased.

Where the mischief sought to be restrained has ceased before the trial of the action, the plaintiff may nevertheless obtain his injunction (i).

Declaration of
right instead of
injunction.

Where the inconvenience to the defendants from granting an injunction would be very great, the Court will sometimes merely make a declaration of right in favour of the plaintiff, without granting an injunction (k).

(c) See *ante*, p. 25.

(d) *Dickinson v. Grand Junction Canal Co.*, 15 Beav. 260.

(e) *Reynell v. Sprye*, 1 D. M. & G. 660; *Blomfield v. Eyre*, 8 Beav. 250.

(f) *Duy v. Snee*, 3 V. & B. 171.

(g) *Morell v. Pearson*, 12 Beav. 284, *ante*, p. 27.

(i) *Dean of Chester v. Smelting Corporation*, W. N. (1901) 179; 85 L. T. 67; but see *Dunning v. Grosvenor Dairies, Ltd.*, W. N. (1900) 265.

(k) See *Islington Vestry v. Hornsey Urban Council*, (1900) 1 Ch. 695 (C. A.); *Smith v. Baxter*, (1900) 2 Ch. 138. See also *Llandudno Urban Council v. Woods*, (1899) 2 Ch. 705.

The title to an injunction at the trial may be lost if there has been acquiescence; but it seems that *mere* lapse of time will not bar the claim to an injunction in aid of a legal right, unless all remedy for the enforcement of such right is barred by the Statutes of Limitations (*l*).

Chap. XXIII.
Sect. 5.

Acquiescence
or delay.

Where the right to a perpetual injunction has been established, the Court has no jurisdiction to compel the plaintiff to accept damages in lieu of an injunction (*m*).

SECTION V.—INQUIRY AS TO DAMAGES WHERE INJUNCTION DISSOLVED.

Though an interlocutory injunction has been granted on the undertaking of the plaintiff as to damages, the Court is not bound to grant an inquiry as to damages in every case in which the injunction is dissolved, or the action is dismissed at the trial. The Court has a discretion, and before it will grant an inquiry as to damages it must be satisfied that the injunction was improperly obtained and that under all the circumstances of the case damages ought to be given. It may happen that an interlocutory injunction is dissolved for delay, or for some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief by way of injunction at the trial. The Court in such a case has a discretion whether under all the circumstances the defendant ought to have damages in respect of the interlocutory injunction having been granted. Moreover, the Court will have regard to the amount of damage; if it be trifling or remote, the Court will not direct an inquiry as to damages (*n*).

in which case the Court, although making a declaration of right, refused an injunction upon the ground that the mischief complained of was trivial.

176; and see *ante*, p. 19.

(*m*) *Woodhouse v. Newry Navigation*, (1898) 1 Ir. R. 161.

(*n*) *Smith v. Day*, 21 C. D. 421 (C. A.).

(*l*) *Fullwood v. Fullwood*, 9 C. D.

Chap. XXIII.
Sect. 5.

Application for
inquiry—when
to be made.

The application for an inquiry as to damages should as a general rule be made either at the time the injunction is dissolved or at the hearing of the cause. But it may be made by motion subsequently to the trial. There is, in fact, no absolute rule as to the time within which the application should be made; but, as a general rule, the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted (o). In *Newby v. Harrison* (p), an inquiry was directed after four months, and special circumstances might induce the Court to allow even a greater delay; but a very special case must be made out (q).

The damages must be confined to the loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice at the time when he makes his application (r).

The defendant is entitled to the benefit of the undertaking as to damages even though it should be decided that the injunction was wrongly granted owing to the mistake of the Court itself (s). Where an injunction has been wrongly granted, an undertaking given by the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case the Court will not as a rule refuse an inquiry as to damages, unless the damages alleged would be too remote, if the defendant was suing in respect of them upon a breach of contract (t).

The Court will not grant an inquiry as to damages where it can satisfy itself without such inquiry as to what is the amount of such damages (u).

(o) *Smith v. Day*, 21 C. D. 421 (C. A.); *Ex parte Hall*, 23 C. D. 644 (C. A.).

(p) 3 D. F. & J. 287.

(q) *Smith v. Day*, 21 C. D. 421 (C. A.).

(r) *Smith v. Day*, 21 C. D. 421 (C. A.).

(s) *Griffith v. Blake*, 27 C. D. 474 (C. A.); *Hunt v. Hunt*, 54 L. J. Ch. 289.

As to the measure of damages where an inquiry is directed, see *Mansell v. British Linen Company Bank*, (1892) 3 Ch. 159; *Schlesinger v. Bedford*, W. N. (1893) 57.

(t) *Hunt v. Hunt*, 54 L. J. Ch. 289, W. N. (1884) 243.

(u) *Graham v. Campbell*, 7 C. D. 490, 494 (C. A.).

SECTION VI.—CONSEQUENCES OF THE BREACH OF AN INJUNCTION Chap. XXIII.
OR RESTRAINING ORDER. Sect. 6.

An order for an injunction must be implicitly observed, and every diligence must be exercised to obey it to the letter (*x*). However erroneously or irregularly obtained, the order must be implicitly observed so long as it exists. A party affected by it cannot disregard it or treat it as a nullity, but must have it discharged on a proper application (*y*). A man who does not obey it to the letter so long as it exists is guilty of contempt, unless there be something to mislead upon the plain reading of the order (*z*). Breach of injunction.

An undertaking entered into with the Court is equivalent to, and will have the effect of an injunction so far that any infringement thereof may be made the subject of an application to the Court (*a*). But where a party had by mistake consented to a more extensive undertaking than he intended, the Court refused to enforce the part of the undertaking which had been given by mistake (*b*). Breach of undertaking.

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal (*c*), and it is usual in the notice of motion to ask for attachment or committal in the alternative (*d*). Committal, however, appears to be the more appropriate remedy for breach of an injunction (*e*). The proper method of enforcing an *undertaking* given to the Court, whether the undertaking be affirmative or negative, is committal, not attachment (*ee*). The notice of

(*x*) *Harding v. Pingey*, 12 W. R. 684; *Spokes v. Banbury Board of Health*, 1 Eq. 42.

(*y*) *Woodward v. Earl of Lincoln*, 3 Sw. 626; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117. Comp. *Daw v. Eley*, 3 Eq. 509.

(*z*) *Spokes v. Banbury Board of Health*, 1 Eq. 42.

(*a*) *London and Birmingham Railway Co. v. Grand Junction Canal Co.*, 1 Ba. Ca. 241, per Lord Cottenham.

(*b*) *Mullins v. Howell*, 11 C. D. 763; and see *Scott v. Moxon*, 81 L. T. 774.

(*c*) Ord. XLII. r. 7.

(*d*) Oswald on Contempt, 2nd ed. 91. For the difference between committal and attachment, see the memorandum on pp. 259—263 of (1893) 1 Ch.

(*e*) See *Mander v. Falcke*, (1891) 3 Ch. p. 491.

(*ee*) *D. v. A. & Co.*, (1900) 1 Ch. p. 489.

Chap. XXIII. motion for committal must be personally served, but service
Sect. 6. of the order in which the undertaking is embodied need not be effected (*f*).

No breach till
notice of
injunction.

The Court will not punish for breach of an injunction or interim restraining order, unless it be clear that the party alleged to be in contempt knew that the injunction had issued, or that the order had been made (*g*). He ought, strictly speaking, to be served with the order itself in the manner already pointed out (*h*). But if the matter is very pressing, the service of the order itself will be dispensed with, and service of a copy of the minutes of the order, or of a notice of its having been obtained, will be sufficient. An injunction operates from the date of the order, and not from the time of sealing. If, after service of the notice or the copy of the minutes, the party enjoined acts in opposition to the order, he is guilty of a contempt, and may be committed (*i*).

Actual service of
order not in all
cases essential.

It is sufficient if
clear notice of
the order is
proved.

A committal may, indeed, be ordered where neither the order nor the minutes of the order have been served, nor any personal notice given, but the party enjoined was in Court at the time the order was made (*k*), or received notice of the order by telegram (*l*). If, indeed, a man remains in Court until the order is about to be made, he cannot, by leaving before the order is actually pronounced, avoid its consequences (*m*). It is sufficient that a man has clear notice, however given, of the order (*n*), and knew that the plaintiff intended to enforce it: and this rule is not limited to

(*f*) *D. v. A. & Co.*, (1900) 1 Ch. 484. But see *Halford v. Hardy*, 81 L. T. 721.

(*g*) *Carrow v. Ferrier*, 17 L. T. N. S. 536, 3 Ch. 721.

(*h*) *Ante*, p. 572. As to its not being necessary to serve an order for the purpose of enforcing an undertaking embodied in it, see *supra*.

(*i*) *M'Neil v. Garratt*, Cr. & Ph. 98; *Gooch v. Marshall*, 8 W. R. 410.

(*k*) *Anon.*, 3 Atk. 567; *Skip v. Harwood*, ib. 564; *Hall v. Trigg*

& *Co.*, (1897) 2 Ch. 219, 222; and see *D. v. A. & Co.*, (1900) 1 Ch. p. 487.

(*l*) *Re Bryant*, 4 C. D. 98; *Ex parte Langley*, 13 C. D. 116; *D. v. A. & Co.*, (1900) 1 Ch. p. 487.

(*m*) *Hearn v. Tennant*, 14 Ves. 136.

(*n*) *Heywood v. Wait*, 18 W. R. 205; *Avory v. Andrews*, 30 W. R. 564; *United Telephone Co. v. Dale*, 25 C. D. 778; *D. v. A. & Co.*, (1900) 1 Ch. p. 487.

cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered. Chap. XXIII.
Sect. 6.

The Court will not, however, commit a man for breach of an injunction, if it be doubtful whether, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it was not the intention of the plaintiff to enforce the injunction (*o*). Where, for example, in consequence of the order not being drawn up and served, the defendant might very fairly consider that the plaintiff did not intend to proceed at all, it was held necessary before the plaintiff could obtain a committal that he should serve the defendant with the original order (*p*). So also, a man who has acted in breach of an injunction will not be committed for contempt, where he swears that though he had received notice of it by telegram, he *bonâ fide* believed that no injunction had been granted and the circumstances show that such belief was not unreasonable (*q*). If it is sought to commit for contempt a man who after receiving such notice disregards it, the Court must decide upon the facts of the particular case whether he in fact had notice of the injunction, and it is the duty of those who ask for committal to prove this beyond reasonable doubt (*r*).

The order for committal is obtained upon motion, notice of which must be served personally upon the party committing the contempt (*s*). The terms of the notice should be that the party "may stand committed to Holloway prison for breach of the injunction" (*t*). If the breach has been committed by a person not named in the order, the notice of motion must be that he may be committed for his contempt in knowingly assisting in the breach (*u*). The Court has undoubted jurisdiction to commit for contempt a person not included in

- (*o*) *United Telephone Co. v. Dale*, 488; *Hope v. Carnegie*, 7 Eq. 260; 25 C. D. 778. *Mander v. Falcke*, (1891) 3 Ch. 488;
 (*p*) *Wood v. Downes*, 18 Ves. 522; *Nelson v. Worssam*, W.N. (1890) 216.
Van Sandau v. Rose, 2 J. & W. 264. (*t*) 1 Set. 743.
 (*q*) *Ex parte Langley*, 13 C. D. 110. (*u*) *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181;
 (*r*) *Ib.* *Seaward v. Paterson*, (1897) 1 Ch. 545 (C. A.).
 (*s*) *Angerstein v. Hunt*, 6 Ves.

Chap. XXIII.
Sect. 6.

an injunction, and not a party to the action, who, knowing of the injunction, aids and abets a defendant in committing a breach of it (x). There is a clear distinction, however, between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the former case, the order for committal is made to enable the plaintiff to get his rights; in the latter case, the order is made because it is not for the public benefit that the course of justice should be obstructed (x).

If it can be satisfactorily shown that personal service of the notice of motion to commit cannot be effected, the plaintiff may, on a proper case being made out, obtain an order (y) for substituted or other service or for the substitution of notice for service by letter, public advertisement, or otherwise, as may seem just, and upon affidavit of such service an order for committal of the party guilty of contempt may be made (z).

A notice of motion for committal or attachment must state in general terms the grounds of the application, and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion (a).

The affidavits, copies of which have to be served with the notice of motion, include the affidavit of service of the order granting the injunction (b); except in cases where service of the order is unnecessary, *e.g.*, where the defendant was in Court and personally consented to the order (c). The affidavits served with the notice of motion must state that the order when served was indorsed with the memorandum pointing out the consequences of neglecting to obey it which is

(x) *Seaward v. Paterson*, (1897) 1 Ch. 545 (C. A.). *v. Jones*, 25 C. D. 64; *Hampden v. Wallis*, 26 C. D. 747; *Petty v. Daniel*, 34 C. D. 172.

(y) See *In re A Solicitor*, W. N. (1892) 22.

(z) Ord. LXVII. 6; *Re Luxmore*, W. N. (1888) 63.

(a) Ord. LII. 4. See *Litchfield*

(b) *Hall & Co. v. Trigg*, (1897) 2 Ch. 219.

(c) (1897) 2 Ch. p. 222.

required by Ord. XLI. r. 5 (d); unless the order is purely prohibitive (e). Chap. XXIII.
Sect. 6.

In a case (f) where the plaintiffs moved to commit the defendants for breach of an injunction which had been granted to restrain a nuisance, and the Court by reason of the conflicting nature of the evidence ordered the motion to stand over in order to be heard with witnesses, it was held that upon the adjourned hearing the applicants could give evidence of breaches of the injunction not specified in the affidavits they had filed, notwithstanding Ord. LII. r. 4.

It seems that the defendant may take advantage of the objection that Ord. LII. r. 4 has not been complied with, even though he has answered the affidavits (g). But the objection may be disposed of by adjournment (h).

The memorandum required by Ord. XXXI. r. 5 need not be endorsed on orders which are purely prohibitive (i).

It is no objection to an application to commit that the plaintiff is moving to commit one only of several co-defendants (k).

An order for committal is *strictissimi juris*, and cannot be sustained, unless it can be shown upon the clearest evidence that there has been an actual breach of the injunction (l). The general terms of an injunction will not, however, be restricted by reference to the particular injury complained of in the action, if the injunction has been in spirit violated (m). But the Court will not allow an injunction to be used for the purpose of oppression or vexation. It is not because a man has an injunction restraining his neighbour from causing a nuisance to him that there should be a motion to commit the defendant by reason of some trifling thing being done in the ordinary course of business, which has not caused any real

Proof of breach
must be clear.

(d) *Stockton Football Co. v. Gaston*, Q. B. 16.
(1895) 1 Q. B. 453.

(e) *Hudson v. Walker*, 64 L. J. Ch. 204. (i) *Hudson v. Walker*, 64 L. J.

Ch. 204. (k) *Newman v. Ring*, 10 Jur. 463.

(f) *Dean of Chester v. Smelting Corporation*, W. N. (1902) 5. (l) *Harding v. Pingey*, 12 W. R.

(g) *Taylor v. Roe*, 68 L. T. 213. 685; *Dawson v. Paver*, 5 Ha. 424.

(h) *Rendell v. Grundy*, (1895) 1 (m) *Att.-Gen. v. Great Northern*

Railway Co., 4 De G. & S. 75.

Chap. XXIII.
Sect. 6.

mischief (*n*). In determining whether there has been a breach, however, the Court will have regard to the circumstances under which, and the objects for which, the injunction was obtained (*o*).

An intention to violate an injunction is immaterial unless the breach be actually carried into effect (*p*). Thus, where an injunction was granted restraining a man and his servants from stopping, impeding and obstructing the passage of boats, &c., along a canal, the placing of a bar which was capable of being easily moved across the canal, and the stationing of persons at a bridge on the canal to give notice to persons passing along that they were trespassing, without however, attempting to stop them, were held not to amount to a breach (*q*).

What constitutes
breach.

Where an injunction was granted against a husband and wife, and a breach of the injunction was committed by the wife, who was living separate from her husband, it was held that the husband could not be committed for contempt (*r*). If a plaintiff who has obtained an injunction misrepresents to the public what has been done by the Court, and the defendant, to correct that misrepresentation, does an act which in strictness is a breach of the injunction, the Court will not entertain any complaint against him on the part of the plaintiff for such a breach (*s*).

Whether parties
not named in
the order can be
committed.

Persons not named in the order are not liable to be committed for breach of the injunction itself (*u*). Thus, where an injunction restrained only A. B., and did not in terms extend to "his servants and agents," the Court declined to commit an agent of A. B. for breach of the injunction, inasmuch as he was not expressly enjoined (*x*). The agents, however, of a man against whom an injunction has been awarded, although

(*n*) *Baxter v. Bower*, 44 L. J. Ch. 626.

(*o*) *Loder v. Arnold*, 15 Jur. p. 118, per Rolfe, V.-C. See *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 104; *Loder v. Arnold*, 15 Jur. 117.

(*p*) *Grand Junction Canal Co. v. Dimes*, 18 L. J. Ch. 419.

(*q*) *Ib.*

(*r*) *Hope v. Carnegie*, 7 Eq. 254, 260.

(*s*) *Barfield v. Nicholson*, 2 L. J. Ch. 90.

(*u*) *Iveson v. Harris*, 7 Ves. 256.

(*x*) *Lord Wellesley v. Lord Mornington*, 11 Beav. 180.

not named in the order, will be committed for *contempt*, if, *having knowledge of the injunction*, they act in contravention of the order of the Court (*y*). Moreover, any person, whether an agent or not, who, knowing of an injunction, aids and abets the party enjoined in committing a breach of it, is liable to be committed (*z*). In such cases the committal is not, technically, for breach of the injunction, but for a contempt of Court tending to obstruct the course of justice (*a*).

Chap. XXIII.
Sect. 6.

If no blame can be attached to a man personally, the Court will not commit him for contempt because his servants (*b*), or his agents (*c*), or his wife, who is living separate and apart from him (*d*), may have committed a breach of the injunction.

Persons not committed unless blame attaches to them personally.

If the party guilty of a breach of injunction is a Peer or a member of Parliament (*e*), or a company or other corporation (*f*), or a person against whom process of contempt cannot issue, whether from his being out of the jurisdiction (*g*) or otherwise (*h*), the proper course is to move that a writ of sequestration shall issue (*i*). But, where committal is sought against a person not a party to the action and not named in

Sequestration.

(*y*) *Lord Wellesley v. Lord Mornington*, 11 Beav. 181; *Seaward v. Paterson*, (1897) 1 Ch. 545 (C. A.).

(*z*) *Seaward v. Paterson*, (1897) 1 Ch. 545 (C. A.).

(*a*) (1897) 1 Ch. 545, 554.

(*b*) *Rantzen v. Rothschild*, 14 W. R. 96.

(*c*) *Ex parte Langley*, 13 C. D. 121.

(*d*) *Hope v. Carnegie*, 7 Eq. 254.

(*e*) *Rantzen v. Rothschild*, 14 W. R. 96. *Comp. Lechmere-Charlton's case*, 2 M. & C. 316.

(*f*) See *Spokes v. Banbury Board of Health*, 1 Eq. 42; *Selous v. Croydon Board of Health*, W. N. (1885) 105; *Re Hooley*, 79 L. T. 706; and see Ord. XLII. r. 31. The principles on which the Court acts when asked to sequester the property of a company for disobedience to an

order are the same as those applicable where it is sought to commit an individual for contempt. An accidental and unintentional disobedience is not enough to justify either sequestration or committal. The Court must be satisfied that its order has been contumaciously disregarded: *Fairclough v. Manchester Ship Canal Co.*, W. N. (1897) 7 (C. A.).

(*g*) *Re East of England Bank*, 2 Dr. & Sm. 284.

(*h*) See *Storer v. Great Western Railway Co.*, 1 Y. & C. C. C. 180.

(*i*) See as to writ of sequestration, *Empringham v. Short*, 3 Ha. 461; *Tatham v. Parker*, 1 Sm. & G. 513; *Pratt v. Inman*, 43 C. D. 175, Ord. XLIII. r. 6. See as to form of order, 1 Set. 745.

Chap. XXIII.
Sect. 6.

Attachment
of officer of
corporation.

Costs.

Frivolous
motions to
commit
discouraged.

the order granting the injunction for aiding and abetting in its breach, *semble*, the privilege from arrest which members of Parliament and certain other persons enjoy would not hold. For, in such cases, the injunction is punitive in its nature (*k*).

In addition to the remedy by sequestration, an injunction against a corporation may be enforced by attachment against the directors or other officers (*l*); but in such a case the director or other officer sought to be attached must have been personally served with the order granting the injunction (*m*).

If, upon hearing the affidavits on both sides, the Court is of opinion that the respondent is guilty of a breach of injunction, it makes an order for his committal, and he will not be discharged unless he pays the applicant's costs (*n*). But where the breach is not wilful or contemptuous, or if the defendant has endeavoured to set himself right, or expresses his regret for what he has done, and promises to obey the injunction, or if the plaintiff does not press for committal, the Court is generally satisfied by merely making him pay the costs of the application of bringing the breach under the notice of the Court (*o*). Though the motion to commit may be refused, it will generally be without costs, if the party against whom it is sought or his solicitor has been to blame in the matter (*p*). But the Court will not encourage motions to commit where no real case for committal is made out, but only an apology and costs are asked for, and the party so moving ought not to be allowed his costs (*q*).

(*k*) See *Paterson v. Seaward*, (1897) 1 Ch. 545, 554 (C. A.); *Long Wellesley's case*, 2 R. & My. 639, 665; *Gent-Davis v. Harris*, 40 C. D. 190; *In re Armstrong*, (1892) 1 Q. B. 327.

(*l*) Ord. XLII. r. 31.

(*m*) *McKeown v. Joint Stock Institute, Ltd.*, (1899) 1 Ch. 671.

(*n*) *Price v. Hutchison*, 18 W. R. 204, 9 Eq. 536.

(*o*) *Little v. Thompson*, 2 Beav. 129; *Lane v. Sterne*, 3 Giff. 629;

Re Bryant, 4 C. D. 100; *Ex parte Langley*, 13 C. D. 110; *Plating Co. v. Farquharson*, 17 C. D. 49. See as to form of order, 1 Set. 745.

(*p*) *Carrow v. Ferrier*, 17 L. T. 536; *Daw v. Eley*, 7 Eq. 49.

(*q*) *Plating Co. v. Farquharson*, 17 C. D. 49, 56; *Metropolitan Music Hall Co. v. Lake*, 60 L. T. 749; and see *The Queen v. Payne*, (1896) 1 Q. B. p. 581; *In re New Gold Coast Exploration Co.*, (1901) 1 Ch. p. 863.

An order for committal for breach of an injunction must recite the affidavit of service of the order granting the injunction, and either the affidavit of service of the notice of motion, or the appearance of the defendant personally, or by counsel, upon the motion (*r*). The order ought in strictness to be prefaced by a declaration that the act complained of is a contempt, but the absence of such a declaration is not a ground for discharging the order for irregularity (*s*). It is not irregular to engraft upon the order a direction that the party committed shall pay the costs of his contempt, but, if the order extends to charges and expenses as well as costs, it is to that extent irregular (*s*).

Chap. XXIII.
Sect. 6.

Form of order
for commitment.

If a mandatory order or injunction be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained or by some other person appointed by the Court or a judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained and costs (*t*).

Court may direct
performance of
judgment by
another person
at the cost of the
disobedient
party.

An order to commit may be appealed from without leave, the liberty of the subject being involved (*u*); but an order refusing an application to commit cannot, since the Judicature Act, 1894, came into force, be appealed from without the leave of the judge (*x*).

An appeal—
when it lies.

(*r*) *Stephens v. Workman*, 11 W. R. 503. v. *Wilson*, 33 W. R. 927.

(*s*) *Ex parte Van Sandau*, 1 Ph. 606. (*u*) See sub-s. (1) of s. 1 of Judicature Act, 1894.

(*x*) *Bowden v. Foxall*, (1901) 1

Ord. XLII. 30. See *Mortimer* Ch. 1 (C. A.).

INDEX.

ABATEMENT OF ACTION, 589

ABATEMENT OF NUISANCE, 234

ABRIDGMENT,

copyright in, 298

whether or not a piracy, 298

ACCEPTANCE,

of bill of exchange, injunction against the, 536

ACCESS,

of light to windows, 141—144

of air to windows, 154

to a highway, 225, 226, 232

to the sea-shore or a navigable river, 209

ACCOUNT,

as incident to an injunction to restrain the violation of a common law right, 27, 75, 76

no account in general unless injunction be competent, 27, 28, 76
exceptions, 76

limited to monies actually received, and profits actually made,
28, 77

no account, if acts be unattended by profit, 28, 77

limited to profits for six years before action brought, 27, 78
exception, 78, 112

delay and acquiescence, as a bar to the application, 28, 78

discovery for purposes of, 28

of waste, 75—78

in cases of trespass to mines, 112, 113

in copyright cases, 325

in trade-mark cases, 332

account not usually taken, 28

ACQUIESCENCE,

principle of, 16

what is necessary to constitute, 16—19

stronger case required to justify refusal of perpetual, than of interlocutory injunction, 18, 26

ACQUIESCENCE—*continued.*

- may preclude a party from all remedy, 19
- distinguished from delay, 19, 27
- cases in which principle does not apply, 16—18
- as a bar to an interlocutory injunction, 18, 138, 265, 361
- as a bar to relief at the hearing, 18, 26
- cases in which the principle applies most strongly, 16, 139
- extent of expenditure to a certain degree the measure of, 16
- of agent binds the principal, 17
- binding on corporation as well as individual, 17
- circumstances, &c., excluding, 17, 18, 348
- conduct with others may constitute, 17, 361
- under order for an injunction, effect of, 588

ACTING,

- not a publication, 429
- injunction to restrain a player from, 402

ADMINISTRATOR,

- restrained from collecting assets, 444

AFFIDAVITS. See *Evidence.*

- application for injunction must be supported by, 557
- when admitted after case is opened, 562
- contents of, 558
 - on *ex parte* application, 557
 - in support of motion to commit, 597
- by whom made, 559
- when sworn, 559
- title of, 559
- form of, 559
- statements based on information and belief, 560
- must be filed, 560
- time of filing, 560, 561
- delivery of copies, 562
- office copies must be in Court at time of making the motion, 560
- of title,
 - in copyright cases, 275
 - in patent cases, 251
- hearing the motion on, 563, 564
- admission of, after opening the motion, 562

AGENT,

- lending himself to the perpetration of a fraud restrained, 342, 343
- principal bound by acquiescence of, 17
- restrained from disclosing confidential communications, 420

AGREEMENT. See *Covenant.*

- construction of, 363
- implication of, 365
- injunctions against breach of, 356 *et seq.*

AGREEMENT—*continued.*

- general principles as to specific performance of, 357
- building or personal agreement not generally enforced, 359, 360
- parties to action to restrain breach of, 367
- conduct of party, who seeks to restrain breach of, must be consistent with equity, 360, 362
 - acquiescence, 361
 - delay, 361
- not to do a thing enforced by injunction, 370
- negative quality may be imported into affirmative, 394
- negative quality not imported into affirmative, 398
- containing both negative and affirmative stipulations, 402
- not to apply to Parliament, 392
- enforced by injunction against persons taking without notice, 405
- ultra vires* on the part of a company, restrained by injunction, 486
- in part legal, in part illegal, restrained by injunction, 490
- in part legal, but illegal in purpose, restrained by injunction, 490
- of promoters of companies to take lands after incorporation, 491
- adoption of, by companies after incorporation, 491
- between landowner and a railway company not affected by Lands
 - Clauses or Railway Clauses Acts, 90
- no aid given to either of the parties to an illegal, 491
- instrument supported, which has no effect at law, 405
- injunctions pending suit for specific performance of, 417
 - against alienation, 417
- perpetual injunctions against breach of, 412
- mandatory injunctions against breach of, 413
- damages for breach of, substituted for injunction, 417

AGRICULTURAL HOLDINGS ACTS,

- provisions of with regard to fixtures and compensation, 80
- condition as to higher rent in case of breach of covenant, 390

AIR,

- passage of, to windows, 154
- passage of, for trade purposes, 155
- right to purity of, rule as to, 155
- injunctions to restrain pollution of, 156
- various nuisances to, 157

ALIMONY,

- injunction to restrain husband from defeating, 541
- wife who has obtained an order for, is in the position of a judgment creditor of her husband, 541

ALMANACKS,

- copyright in, 290
- piracy of, 296

ALTERATION OF PROPERTY,

- waste by, 38, 48—51
- in breach of covenant in lease, 548

AMBASSADOR,

- no jurisdiction over, who does not submit, 7
- injunction to restrain a man from handing over monies to an, 538

AMEND,

- leave to, without prejudice to notice of motion, 562, 563

AMENDMENT,

- effect of, on notice of motion, 562
- effect of, on injunction, 589

ANCIENT LIGHTS. See *Lights, Nuisance, Window.***APPEAL,**

- injunctions to restrain the violation of a legal right pending, 24, 273
- injunctions to stay sale pending, 534
- suspension of injunction pending, 13, 24, 273

APPEARANCE,

- service of notice of motion before, 554—556
- service of notice of motion after, 554
- injunction ordered on affidavit of service for want of, 567

APPREHENDED INJURY,

- injunction when granted in case of, 13, 125, 358

ARBITRATION,

- when a party will be restrained from proceeding with, 6, 7, 538

ARBITRATION ACT,

- reference directed by Court under, 579

ARBITRATOR,

- not restrained by injunction from making an award, 538
- except in special cases, 539

ARITHMETIC BOOKS,

- copyright in, 290
- piracy of, 296

ARTICLES,

- contributed to periodicals, reviews, &c., copyright in, 300—302

ASSIGNMENT,

- of a share in a patent, 248
- of copyright, 287—289
- of the right to use a trade mark, 337
- of negotiable instrument restrained, 536

ASSOCIATIONS. See *Society.***ATTACHMENT, 593**

- of officer of corporation for disobedience to injunction, 600

ATTORNEY-GENERAL,

- absolute discretion of, 507
- must sue, if act complained of affects the public interest, 87, 119, 507, 551
- injunctions at suit of, to restrain trespass, 87
 - nuisance, 119
 - purprestures, 206
 - a company from going beyond the purposes for which it was incorporated, 134, 470
- injunctions at suit of, to restrain a corporation or public body from misapplying its funds, 507
- not a party if act complained of do not affect the public interest, 459

AWARD,

- no injunction to restrain arbitrator from making, 538

BALANCE OF CONVENIENCE. See *Convenience*.**BANK OF ENGLAND.** See *Transfer of Stock*.

- injunctions at suit of, to restrain a banking company from accepting a bill of exchange, 536
- restrained by injunction, 529
- restraining order against, 530

BANKS OF A RIVER,

- not to repair is waste, 44

BARRIERS IN MINES, 113, 196**BELL RINGING,**

- injunctions against, 118, 159

BENEFIT BUILDING SOCIETY,

- members bound by rules, 500

BILL OF EXCHANGE,

- injunctions against negotiation of, 536
- injunctions against acceptance of, 536

BISHOP. See *Ecclesiastical Persons*.

- may not open mines, 64
- injunctions against, 64
- restrained from presenting, instituting, or collating, 418, 515
 - interfering with vicar, 516

BLASTING ROCK,

- injunction against, 162

BOARDS OF HEALTH,

- injunctions against, 110, 136, 203
- injunctions at suit of, 135

BOOK. See *Copyright*.

- within the meaning of the Copyright Act, 284, 291
- of an immoral, indecent, seditious, &c., nature, no copyright in, 292
- a separate article for a periodical is not a, 286
- of chronology, copyright in, 290
- of statistics, copyright in, 290
- elementary lessons in science, arithmetic, &c., copyright in, 290
- guide book, copyright in, 290

BREACH,

- of covenant or agreement. See *Agreement, Covenant*.
- of injunction, 593. See *Committal*.
 - what constitutes, 598
 - no breach till notice of injunction, 594
 - service of order, when necessary, 594
 - committal for, 593 *et seq.*
 - sequestration for, 599
 - attachment for, 593, 600.
 - costs, 600
 - of undertaking, 593

BREWHOUSE,

- not necessarily a nuisance, 157

BRICKBURNING,

- injunctions against, 156

BUILDING CONTRACT.

- court will not generally enforce, 359

BUILDING SOCIETY. See *Benefit Building Society*.**BUILDINGS,**

- waste in, 50
- equitable waste in, 66
- alteration of, with respect to rights of light, 152, 153
- right to support for, from adjacent and subjacent soil, 165, 166
- from adjacent buildings, 176, 177

BURIAL,

- rights of, mortgagee of burial ground bound by, 65
- injunction to restrain, 544

CALENDARS,

- copyright in, 290
- piracy of, 296

CANAL,

- fouling a, 193, 204
- abstraction of water from a, 192, 204

CANAL—*continued*.

- rights, &c., in artificial watercourse attach to a, 192
- easements in a, 192
- order restraining the keeping a, out of repair, 414

CHAPEL,

- injunction to restrain a man improperly appointed from officiating as minister of a, 458
- injunctions to restrain a, from being enjoyed by persons not contemplated by the deed of foundation, 458
- trustees of, restrained from mortgaging, 459

CHATTELS,

- injunctions against selling specific, 534

CHILD,

- injunctions against father with respect to custody of, 542

CHIMNEY,

- right of passage of air to a, 155
- obstruction of, 162

CHURCH,

- altering the fittings in a, 65
- warming a, in a manner injurious to health, 245
- injunctions to restrain a man, improperly appointed minister, from performing divine service in a, 458
- trespass in, 65

CHURCHWARDENS,

- injunction against, 245, 516

CHURCHWAY,

- mandatory injunction to restore, 65

CHURCHYARD,

- timber in a, 63
- nuisance in a, 245
- injunctions against waste in a, 65
- rights of burial in a, 65
- trespass in, 65

CLAY,

- waste by digging, 44
- estovers of, 46
- right of copyholder of inheritance by custom to dig, 47

CLERK,

- restrained from communicating, or making public papers, documents, &c., of his employer, 420, 425, 426

CLUB,

- expulsion from, injunction against, 500—504
- alteration of rules of, 503

COLLUSION,

waste by, 73

COLOURABLE IMITATION,

of a work protected by copyright, 295—297

of a trade mark, 348, 349

of a patent, 261

COMMISSIONERS,

ecclesiastical, action by, to restrain waste, 64

drainage,

restrained by injunction, 137

of sewers,

restrained by injunction, 137

powers, &c., of, 109, 208

of woods and forests,

restrained by injunction, 137

COMMIT,

motion to, 595

notice of, 595

service of, 596

affidavits in support of, 596

costs of, 600

frivolous motions to, discouraged, 600

COMMITTAL,

for breach of injunction, 593

ordered after notice of order, 594

to warrant, proof of breach must be clear, 597

notice of motion to commit, 595

frivolous motions to commit discouraged, 600

no, against parties not named in the order, 598

no, against persons not personally to blame, 599

form of order for, 601

appeal, 601

COMPANIES. See *Directors, Dividends, Preference Shares, Shareholder.*

restrained from doing illegal acts, 469 *et seq.*

not restrained when acting within their powers, however injurious, 128

exception in the case of gas companies, 129 n.

restrained from using name calculated to deceive, 498

exist only for the purposes for which they are incorporated, 469

agency of, limited to what is defined by the legislature, 469

restrained from exceeding the limits of their authority, 85—87, 126,

470

at suit of Attorney-General, suing on behalf of public, 87, 119,

470

no substantial damage need be shown, 471

at suit of private person, who can show special damage, 87, 119

473

COMPANIES—*continued.*

- restricted in the user of land, taken under statutory powers, 474—477.
- restricted from doing illegal acts as against individual members, 473, 477
- rights in equity *inter se* of members of, 478
- restrained at suit of a shareholder suing on behalf of himself and all other shareholders, 478, 481
 - or suing in his own name, 478
 - from misapplying the funds of the company, 482
 - from entering into improper contracts and engagements, 486
 - who may sue, 478—480, 495
 - preference shareholder, 484
 - defendants to suit, 480
 - delay and acquiescence as a bar to the suit, 480
- may apply funds to a purpose legitimately connected with the objects of the company, 487
- not interfered with in matters of internal regulation, 491
 - unless in exceptional cases, 493
- company may not be registered or carry on business under a name calculated to deceive, 498

COMPENSATION,

- under Lands Clauses Act, 95
- for land taken, 95
- for lands injuriously affected by works authorised by Statute, 96, 131
- landowner not bound to prove damage before seeking, 133
- need not be tendered before commencing works, 132
- injunction to restrain a man from seeking, 133
- in what cases not given, 131

CONDUCT,

- of applicant for injunction must have been free from fraud, &c., 15, 278

CONFIDENCE,

- injunctions against acts in breach of, 420, 428

CONFIDENTIAL COMMUNICATIONS,

- injunctions against the disclosure of, 420—426
- not protected from disclosure, if there be fraud or an illegal purpose, 421, 422

CONSENT TO INJUNCTION

- cannot be withdrawn, 588

CONSERVATION,

- right of, in navigable tidal waters, 207

CONSERVATORS OF THE THAMES

- restrained by injunction, 137

CONSTRUCTION,

- of covenants or agreements, 363
- of works authorised by statute, 126
 - rule at law as to damage resulting, 126—128
 - must be *bonâ fide*, doing as little damage as possible, 126—128.

CONTEMPT, 547

- injunctions against doing acts, which, if done, would be, 548
- in acting in contravention of injunction, 599

CONTINGENT REMAINDERS,

- injunctions at suit of trustees to preserve, 55

CONTINUING INJUNCTIONS, 590

CONTRACT. See *Agreement, Covenant*.

CONVENIENCE AND INCONVENIENCE,

- balance of, taken into consideration, 21, 25, 26, 84, 145

COPARCENERS,

- injunctions against waste between, 56

COPYHOLDER. See *Lord of a Manor*.

- may restrain waste by copyholder for life, 58
- can restrain waste by lessee, 58
- can restrain trespass by lord of manor, 48
- can restrain waste by lord of manor, 58
- lord of manor can restrain waste by, 58
- interest of, in trees, 41
 - in mines, gravel, clay, &c., 47

COPYRIGHT,

- in general, 273, 283
- in books, 284
 - subject matter of, what may be the, 290
 - entry in the register book, 285
 - assignment of, 287
 - agreement to publish not an, 288
 - by foreigner, 288
 - rights of assignor after, 289
 - license to publish not an, 289
 - title by devolution, 289, 290
 - foreigner resident abroad has no, 284
 - of British author resident abroad, 284
 - infringement of, 292
 - extracts and quotations, 293
 - multiplication of copies, 299
 - colourable imitations, 295
 - test of piracy, 297
 - abridgment, 298
 - digest, 298
 - translation, 299. See *Translation*.

COPYRIGHT—*continued.*in books—*continued.*infringement of—*continued.*

dramatising a book is not an, 300

reading or reciting, &c., in public is not an, 299, 300

injunctions against the, 278—280.

pleading and affidavits, 275, 276

parties, 277

discovery, 277

delay and acquiescence, 277

extent of, 279

equitable owner may have, 275, 277

in articles contributed to periodicals, &c., 300

injunctions against infringement of, 301

pleading, 302

in lectures, 302, 434

of the Crown in reports, 302

of reporter of speech, 302

in reports of judicial proceedings, 302, 303

dramatic and musical, 303

what is a publication, 304

who is an author, 304, 305

assignment of, 305

piracy of, 306

pleading, 307

in prints, engravings, and etchings, 308

what is a piracy of, 308, 309

pleading, 311

in sculpture, 315

in drawings, paintings, and photographs, 311

in designs, 317

pleading, 320

international, 321

translations of foreign books, 322

injunctions against infringement of, 279—282

discovery, 277

intent not material, if there is infringement, 281

account, as incident to, 325

discovery for purposes of, 326

delivery of pirated copies, 326

inquiry as to damages, 326

discovery for purposes of, 326

costs, 327

importation of pirated copies, 282, 324

CORPORATIONS,

may at common law dispose of the corporate property, 506

equity does not interfere with, except in cases of breach of trust, &c.,

506

CORPORATIONS—*continued.*

- confined strictly within the limits of their powers, 509
- who should sue, 507
- under Municipal Corporation Act, 508
 - restrained from misapplying corporate funds, 509
 - delay not material, 513
- under statute,
 - must act within the limits of their authority, 509
 - restrained from misapplying corporate funds, 509
- eleemosynary, 513
 - equity will not interfere with, unless there be a breach of trust, 514
 - jurisdiction of visitor, 513, 515
- spiritual or ecclesiastical, 515
 - equity will not interfere with, unless there be a breach of trust, 515
 - or there be a special equity in the case, 515
 - bishop restrained, when, 515, 516

COSTS,

- of motion, 572—576
 - to commit, 600
- of action, 28—31
- plaintiff, although successful in action, may be deprived of costs if conduct oppressive or the like, 28, 29
- costs of prosecution of action after defendant has offered to submit, 29, 30
- in patent cases, 272
- in trade-mark cases, 354
- security for, 563
- s. 116 of County Courts Act, 1888, does not apply where main relief sought is an injunction, 11
- costs may be given on higher scale, 31
- costs in copyright cases, 327

COUNSEL,

- no injunction to restrain employment of, 424

COUNTY COURTS,

- injunctions to restrain proceedings in the, 518
 - principles on which granted, 518, 519
- jurisdiction of, by injunction, 11

COVENANTS. See *Agreement, Liquidated Damages, Penalty.*

- construction of, 363
- implication of, 365
- in restraint of trade, 375. See *Restraint of Trade.*
- with a penalty, 386
- to pay increased rent on breach, 389
- not to apply to Parliament, 392

COVENANTS—*continued*.

- not to oppose a bill in Parliament, 394
- breach of, 370
- injunctions against breach of, 356 *et seq.*
 - conduct of party applying taken into consideration, 360, 362
 - a man who has been himself guilty of a breach cannot have, 360, 362
 - acquiescence and delay as a bar to the application, 361
 - reversioner may sue, 369
 - parties, 368
 - rights of other parties taken into consideration, 363
- negative enforced by injunction, 370—375
- negative quality imported into affirmative, 394
- negative quality not imported into affirmative, 398
- containing affirmative and negative stipulations, 402
- restrictive covenants, 406
- enforcement of, against persons taking with notice, 405
- relating to the use and occupation of land enforced against persons taking with notice, in what cases, 405
- mandatory injunctions against breach of, 413—417
- perpetual injunctions against breach of, 412
- damages for breach of, substituted for injunction, 417
- vague, not enforced, 375

CRIMINAL PROCEEDINGS,

- no injunction to restrain, 7

CROPS,

- damage to, 244

CROWN,

- copyright of, in reports, 302
- right to foreshore, 210
- trespass by, 85
- undertaking by, 568
- right to use patent, 255

CURTESY,

- tenant by, may not commit waste, 38

CUSTOM,

- of London, with regard to obstructing lights, 151
- of the country to cultivate according to good husbandry, 49

DAMAGE,

- irreparable, 14, 26, 32, 123
- prospective or threatened, 13, 36, 125, 583
- special, 87, 119
- temporary, 123
- substantial, 117
- from repetition may be substantial, 123

DAMAGE—*continued.*

- to rights in water, 181—185, 200—205
- in the construction of works, rightfully and properly done, 128
- wrongfully or improperly done, 126

DAMAGES,

- no appeal on question of, 584
- given, instead of an injunction, 26, 270, 582
- inquiry as to, 584, 591
- inquiry as to, not directed in addition to account, 353, 584
- discovery for purposes of inquiry as to, 326, 353
- in case of threatened injury, 583
- undertaking as to, 23. See *Undertaking*.
- liquidated, 386. See *Liquidated Damages*.
- inadequacy of the remedy by, as the ground for an injunction, 14, 26
- injunction not granted where damages the proper remedy, 6, 583

DANCING,

- as a nuisance, 159

DEAN AND CHAPTER. See *Ecclesiastical Persons*.**DEBTOR,**

- not restrained from dealing with or removing his property, 537
- unless a proper case be made out, 537

DEDICATION,

- of highways, 227—231

DEER,

- destroying or reclaiming, 44

DELAY. See *Acquiescence*.

- may disentitle a man to an interlocutory injunction, 19, 138, 254, 347, 513
- in cases of waste, not so material as in other cases, 37
- not material, so long as things remain *in statu quo*, 19, 513
- in coming for an account, 28
- whether material where perpetual injunction claimed in aid of legal right, 19, 27
- not material in case of corporation, 513

DESIGNS,

- copyright in, 317—321

DEVIATION. See *Way*.

- limits of, under Railway Clauses Act, 102
 - land necessary for the proper purposes of the company may be taken, though beyond the, 103
 - land may not be taken, except for the proper purposes of the Act although within, 104
- injunction to restrain a railway company from exercising their powers of, 104
- party seeking to restrain deviation must show that he is injured, 103

DICTIONARIES,

- copyright in, 290
- piracy of, 296

DIRECTORS,

- restrained from excluding one of their number from acting, 497

DIRECTORY,

- copyright in a, 290
- piracy of, 296

DISCLOSURE,

- of confidential communications, papers, &c., restrained, 420
 - no injunction, if there be fraud, &c., 421
- of trade secrets not restrained, 424
 - unless there be breach of confidence, 425

DISCOVERY,

- in patent cases, 253
- in copyright cases, 277, 326
- in trade-mark cases, 343, 353
- for purposes of account or inquiry as to damages, 28, 326, 353

DISMISSAL OF ACTION,

- injunction goes of course on, 589
- another action may be brought notwithstanding, 589

DISSOLVING INJUNCTION, 584—588**DISTRINGAS,**

- orders in the nature of a, 531

DIVIDENDS,

- improper payment of, by a company, restrained, 484
- no injunction against payment of, if capable of being sanctioned by a general meeting of the company, 492

DIVINE SERVICE,

- injunction to restrain a minister or incumbent of a chapel improperly appointed from performing, 458

DOCUMENTS,

- injunctions to restrain the parting with, 537
- injunctions to restrain a man from preventing another from having access to, 537

DOWRESS,

- punishable for waste at common law, 38

DRAIN,

- right of, 160
 - interference with, a nuisance, 161

DRAINAGE,

- in general, 195
- Commissioners restrained by injunction, 137

DRAMATIC PIECES,

- copyright in, 303
- stage copyright or right of representation in, 303
 - assignment of, 305
 - piracy of, 306
 - who entitled to, 303, 304, 323
- injunctions against performance of, 307

DRAWINGS,

- copyright in, 311

DRIP,

- right of, 160

DROWNED MINE,

- no right to support from a, 164

EASEMENT,

- right to, passes by implication of grant upon severance, 146, 166, 199, 211
- no implication of reservation of right to, on severance, 148
- extinguishment and merger of, 152, 188, 224
- abandonment of, 152, 190, 223
- title to, by prescription, 149, 185, 217
 - right limited by actual enjoyment, 153, 188, 219
 - alteration in mode of user, 152, 189, 220
- owner of an, not entitled to notice under Lands Clauses Act, 93
- interference with, restrained by injunction, 548

ECCLESIASTICAL BENEFICE,

- presentation to, restrained, 515

ECCLESIASTICAL COMMISSIONERS,

- sanction of, when necessary, 64

ECCLESIASTICAL COURTS,

- injunctions in aid of the, 65
- no injunction where, have jurisdiction, 65

ECCLESIASTICAL PERSONS,

- their powers of alienation at common law, 62
- their rights of waste at common law, 63
- restraining Statutes relating to, 62, 63
- may cut timber for repairs, 63
 - or for providing other timber more suitable for repairs, 64
 - but not for general expense of repairs, 64
- injunctions against, at whose instance granted, 64
- waste by, 63, 64
 - account of, 76, 77

ELECTRIC WIRES,

- overhead and underground, 111

ENDORSEMENT,

of securities, injunctions against, 536

ENGRAVINGS,

copyright in, 308

piracy of, 308, 309

no copyright in immoral, &c., 310

printed abroad, copyright in, 310

ENTRY,

and inspection, mandatory order for, 418

EQUITABLE ASSIGNMENT,

injunctions to enforce, 467

EQUITABLE WASTE,

what constitutes, 66

pulling down buildings, 66, 67

cutting ornamental timber, 68—70

young trees and saplings, 71

underwood of insufficient growth, or at unseasonable times, 71

wanton destruction or spoliation, 71

who are within the principle,

tenant for life without impeachment of waste, 65, 71, 72

tenant for life with executory devise over, 58

tenant for life after possibility of issue extinct, 57

tenant by lease for lives renewable for ever, 58

account of, '75—77

alterations in law by Settled Land Act, 79, 80

ESTATE,

a timber, 40

injunction to stay sale of an, 533

ESTOVERS,

of trees, 43

of minerals, clay, &c., 46

of turves, 46

on ecclesiastical estates, 63, 64

copyholder entitled to, 43

ETCHINGS,

copyright in, 308

EVIDENCE. See Affidavits.

on a motion, 557—562

new, after opening motion, 562

case made out by the, must correspond with allegations of statement of claim, 564

on motion to dissolve, 586

scientific, or expert, 124, 140, 145, 580

EXECUTOR,

- injunction to restrain getting in assets, 444
- injunction to restrain parting with assets, 444
- of debtor in possession, waste by, 61

EXECUTORY DEVISE. See *Tenant in Fee*.**EX-PARTE INJUNCTIONS,**

- when made, 555
- time for making motion for, 557
- affidavits, on application for, 557
- motion to dissolve, 586
- where dissolved, applicant may again apply, 587

EXPULSION FROM CLUB,

- in what case restrained by injunction, 500—504

FARMING,

- according to the custom of the country, 49

FATHER. See *Parent and Child*.

- restrained from management of children, 542

FERRY,

- nuisance to a, 235

FIREWORKS,

- letting off, 162

FISHERY,

- nuisance to a, 207
- shutting out the tide from a, 207

FISH-POND,

- waste in a, 44

FIXTURES,

- removal of, 52
- set up in relation to trade, 52
- set up for ornament, 53
- right to, as between landlord and tenant, 52
- right to, as between heir and executor, 53
- right to, as between tenant for life and remainderman, 53
- right to, as between successive incumbents of a benefice, 54

FLOOD WATER,

- cannot be thrown on to land of neighbour, 198

FOOTPATH,

- obstruction of, 162

FOREIGN COURTS,

- injunctions to restrain proceedings in, 520—528
 - principles on which Court interferes, 520
 - after decree for administration, 521
 - after a decree in this country, 522
 - when suit abroad is not so well suited to the purposes of justice, as the suit here, 523
- limits of the jurisdiction to restrain suits in, 526
- proceedings in, allowed to go on, 525

FOREIGN GOVERNMENT,

- no injunction to restrain parties from applying to a, 10
- injunctions to restrain application of funds to a company in defraying the expenses of an application to a, 486

FOREIGN LAWS. See *Laws of a Foreign Country.***FORESHORE,**

- injury to, injunction against, 210

FORFEITURE,

- of shares in public companies, restraining, 477
- must be waived by persons coming to equity for relief, 36
- for waste, 36

FOULING,

- a natural stream or river, 185
 - injunctions against, 201
- an artificial watercourse, 193
- a well, 195
 - injunction against, 195
- a navigable tidal river, 207
- within the prescription Act, 187

FRAUD,

- colourable imitation, 295, 348
- right to prevent use of a trade mark is lost by fraud, 344
- all parties who lend themselves to perpetration of a, may be restrained by injunction, 342

GARDENS,

- waste in, 4

GAS COMPANY,

- restrained from committing nuisance, 129 n., 156

GENERAL RELIEF,

- injunction may be had under claim for, 551

GLEBE,

- timber on, 63
- mines under, 64

GOVERNMENT,

- no interference with the public duties of a department of the, 7
- no interference with the sovereign acts of a foreign, 7

GRAMMARS,

- copyright in, 290
- piracy of, 296

GRANT,

- construction of a, 146, 199, 213
- of lands and mines, effect of, 44
- general words in, how restricted, 148
- reservation from grant must be expressly made, 148
- when a man may derogate from his, 147
- implied grant of light, 146

GRAVEL,

- waste by digging, 44, 45
- estovers in, 46
- right of copyholder of inheritance by custom to dig, 47
- in the waste of a manor, right of lord to take, 48

GUARDIAN AND WARD. *See Infant.*

- injunction to restrain guardian from acting, 543
- injunction to restrain guardian from permitting marriage of ward, 541

GUIDE BOOK,

- copyright in a, 290
- piracy of, 296

HARBOURS,

- nuisance to, 206, 209

HEALTH,

- boards of, restrained by injunction, 110, 136, 203

HEIR,

- by resulting trust within principle of equitable waste, 58

HIGHWAY,

- modes of creating a, 226
- dedication, 227—231
- statute, 226, 227
- not an easement, 231
- ownership of soil of, 231
- foundrous, 232
- nuisance to, 233
- injunctions against, 234
- trespass on a, 114
- injunctions against, 114
- right of access to, 232, 234
- injunctions against obstructing, 226, 235
- altering level of, to injury of adjoining owners, 226

HOSPITAL,

not necessarily a nuisance, 157

HOUSE,

meaning of, within Lands Clauses Act, 98
a man not bound under Lands Clauses Act to sell or convey part
of a, 96, 97

HOUSES,

waste in, 50

HOUSE OF LORDS,

copyright in trials before, 302
injunction pending appeal to, 25

HUSBAND AND WIFE. See *Alimony*.

injunctions between, 540
against disposing of her separate estate, 540
against assigning, &c., her equitable interest, 540
against molesting her in her business, 540
enforcing proper covenants in a separation deed, 540

IMPEACHMENT OF WASTE. See *Without Impeachment of Waste*.**IMPORTATION,**

of copyright works restrained, 282
of pirated works, 314

IMPROVEMENT,

in patent, no answer to infringement, 259

INCUMBENT,

of a parish, restrained from performing divine service, 458

INFANT,

tenant in tail in possession, waste by guardian of, 56
custody and guardianship of, 542
restrained from marrying, 541

INFORMATION,

to restrain trespass, 87, 206
to restrain nuisance, 119, 206
to restrain companies from exceeding their powers, 470
to restrain corporations from misapplying the corporate funds, 509

INFRINGEMENT,

of copyright, 292
in books, 292
in dramatic pieces and musical compositions, 306
in prints, &c., 308
in designs, 319

INFRINGEMENT—*continued.*

- of patents, 246
- intention immaterial, if there has been an, 255, 281

INJUNCTION. See *Motion, Writ of Injunction.*

- meaning of interlocutory, 1, 2
 - general principles on which granted, 2, 12—15
- not in general granted, except a writ of summons has issued, 550
 - exceptions, 550
- should be specifically claimed, 550
- not in general granted, except against a party to the action, 552
 - exceptions, 552
- may be obtained at any stage of the proceedings, 554
- may be obtained during vacation, 554
- by whom application for, should be made, 553
- obtained on *ex parte* application, 555. See *Ex parte Injunctions.*
 - interim order, 565
- claimed must be consistent with case made out, 565
- ordered on affidavit of service, if defendant does not appear, 567
- terms of order for, 569
- order for, should be specific and should declare the rights, 571
- waiver of irregular, 588
- acquiescence under order for, 588
- service of notice of order for, 572, 594
- operates from date of order, 594
- operates *in personam*, 9
- does not run with the land, 139
- effect of amendment on, 589
- goes of course on dismissal of action, 589
- dissolution of, 584—587
- discharge of order for, 588
- continuing at the hearing, 590
- declaration of right instead of, 590
- plaintiff not bound to take damages in lieu of, 591
- consent to, cannot be withdrawn, 588
- irregular, may be discharged, 588
- granted though mischief has ceased, 590
- perpetual, meaning of, 2. See *Perpetual Injunctions.*
 - not granted without consent before the hearing, 27, 590
 - granted though not claimed, 638
 - granted after legal right established, 25
 - not granted in trivial case, 6
 - nor where damages the proper remedy, 6
- mandatory, 31—34
 - not in general granted on motion, 34, 590
- must be implicitly observed, so long as it exists, 593
- breach of, 593 *et seq.*
 - consequences of, 593

INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW,
jurisdiction of Court of Chancery by, abolished, 10

INJUNCTIONS TO RESTRAIN PROCEEDINGS IN INFERIOR
AND FOREIGN COURTS,

Lord Mayor's Court, 518

County Courts, 518

Foreign Courts, 520

Special tribunals, 519

principles on which the Court interferes, 518

IN *PERSONAM*,

injunction operates *in personam*, 9

consequence of this, 9

injunction does not run with land, 10

INSPECTION OF PROPERTY, 580

of mines, 581

mandatory order for entry and, 418, 580

order made on interlocutory application, 481

practice and affidavits, 581

INSTITUTION OF PROCEEDINGS,

injunctions to restrain the, 10

INTERIM ORDER, 23

convenience of proceeding by, 565

practice, 565, 566, 581

INTERNATIONAL COPYRIGHT, 321

INTERRUPTION,

under the Prescription Act, 150

IRREPARABLE DAMAGE,

meaning of, 14, 123

on application for perpetual injunction, 25

IRRIGATION,

water taken for purposes of, 182

JOINT TENANTS,

remedies for waste between, 56

JUDGMENT CREDITOR,

may have an injunction to restrain the debtor from parting with or
dealing with his property, 537, 540

JUDICATURE ACTS, 1873 and 1875,

jurisdiction of Court of Chancery transferred to the High Court, 1

jurisdiction of Court of Chancery to restrain actions at law abolished
by, 10

jurisdiction of the High Court of Justice under the, 3—11

K.I.

40

JUNCTIONS,

between railway companies, questions relating to, 107

JURISDICTION OF THE HIGH COURT TO GRANT INJUNCTIONS, 3—11

jurisdiction formerly confined to Court of Chancery, 1

Common Law Procedure Act, 1854, 1

jurisdiction transferred to High Court by Judicature Act, 1873, 1

effect of s. 25, sub-s. (8) of Judicature Act, 1873, 3—6

does not confer arbitrary discretion to grant injunctions, 3

enables Court to grant injunctions where before they were not in practice granted, 4—6

in cases of libel, 6

principles on which jurisdiction exercised not altered by Judicature Act, 6

no jurisdiction in matters merely criminal, 7

jurisdiction to restrain by injunction actions pending in High Court abolished, 10

the institution of proceedings may be restrained, 10

jurisdiction in respect of acts to be done abroad, 9

jurisdiction of County Court, 11

JUSTICES OF THE PEACE,

restrained by injunction, 137

LABEL. See *Trade Mark*.

LACHES. See *Acquiescence*, *Delay*.

LANDLORD AND TENANT,

tenant restrained according to terms of his covenant, 62

tenant restrained from committing waste, 61, 62

underlessee restrained from committing waste, 62

lessee losing the right to light, 151

LANDOWNER,

agreement between a, and the promoters of public works, 491

rights of a, against the promoters of public works, 88

rights of a, against persons who have taken his land under compulsory powers, 473, 474

not compellable to sell in certain cases a partial interest, 96—98

clauses prohibiting a company from taking land without consent of, 108

right of pre-emption of superfluous lands, reserved to, 101

LANDS,

injuriously affected by the execution of public works, 126

taken compulsory, to what uses they may be applied, 88, 89, 108, 474

LANDS CLAUSES CONSOLIDATION ACT, 88—102

compulsory powers of purchase may not be exercised otherwise than for the purposes of the undertaking, 88

LANDS CLAUSES CONSOLIDATION ACT—*continued.*

- in exercising powers of the Act its provisions must be strictly adhered to, 90
- the Act does not over-ride or control an express contract, 90
- notice to treat, 91
 - how far the relation of vendor and purchaser created by, 92—94
 - cannot be withdrawn without landowner's consent, unless a counter-notice served, 92, 93
- company restrained from entering on land until monies awarded have been paid or deposited, 94
- landowner whose property is injuriously affected by exercise of powers should claim compensation, not an injunction, 96
- company cannot insist upon taking part only of a house, building, or manufactory, 96, 97
- superfluous land of a company, right of pre-emption in regard to, 101

LAW REPORTS,

- copyright in, 291, 302

LAWS OF A FOREIGN COUNTRY,

- interference in aid of, when refused, 8

LEASES,

- of ecclesiastical corporations, 63—65
- covenants in, enforced by injunction, 371—375
- underlessee restrained from committing waste, 62

LEASES AND SALES,

- of Settled Estates Act, as regards timber and waste, 79

LECTURES,

- right of property in, at common law, 434
- statutory right in, 302, 435
- injunctions against the publication of, 435

LESSEE. See *Landlord and Tenant.***LETTERS,**

- copyright in published, 290, 291
- right of property in unpublished, 432
 - qualification of the, 433
- injunction against the publication of, 432, 546
 - delay may be a bar to the application, 434
- receiver has no right to publish, 433
- injunctions against opening, 545
- mandatory injunction to withdraw notice to Post Office, 546

LIBEL,

- injunction to restrain the publication of, 6

LICENSE,

- to use a patent, 248
- to publish a book is not an assignment, 289

LICENSEE,

- right of, to sue in respect of nuisance, 121
- of a patent cannot sue, 248
- infringement by, 259

LIGHT. See Window.

- right to, by agreement or grant, 146
- implication of grant of, upon severance of a tenement, 146
- no implication of reservation of right upon severance, 148
 - exception, 148, 149
- right to, under the Prescription Act, 149
 - right is absolute and indefeasible, 149
- extinguishment of right—merger, 152
- angle of 45 degrees, rule as to, 143
- abandonment of right to, 152
- right to, not lost on rebuilding a house, 152
- right to, cannot be extended on rebuilding, 153
- injunctions to restrain the obstruction of, 142
 - principles on which granted, 145
 - reference to Chambers as to erection of buildings, 153
- surveyor appointed by Court, 145

LIMITATIONS, STATUTE OF,

- in reference to account in general, 28, 78
- in reference to account in waste, 78
- in reference to account in trespass, 112
- delay, short of time limited by, 19, 27

LIQUIDATED DAMAGES,

- as distinguished from a penalty, 386
- no injunction against doing an act permitted to be done, on payment of, 386

LITHOGRAPHS,

- copyright in, 308

LOCAL AUTHORITY,

- cannot enforce its bye-laws by injunction, 8

LOCAL GOVERNMENT ACT,

- persons acting under, restrained by injunction, 137

LONDON BUILDING ACT, 1894,

- does not authorise interference with easements, 144

LORD OF A MANOR. See Copyholder.

- property of, in trees, 41
- right of, to minerals in copyholds, 47, 48
- right of, to take gravel, &c., in the waste of the manor, 48
- right of, to approve against common of turbary and estovers, 48
- can have an injunction to stay waste by copyholder, 58

LORD OF A MANOR—*continued.*

- may not cut timber on copyhold tenement, 41
- injunction to stay trespass by, 41

LUNATIC,

- timber cut on estate of a, 43

MAGAZINES,

- copyright in articles contributed to, 300—302

MAGISTRATE,

- where a statutory remedy before, injunction, as a rule, not granted, 7

MANDATORY INJUNCTIONS,

- principles on which granted, 31—33
- may be granted in positive form, 31
- balance of convenience will be taken into account, 31, 32
- mandatory injunction may be granted although work completed before action, 33
- where work has been proceeded with after notice of appeal, 33 n.
- where defendant hurries on buildings after service of notice of motion, 34
- not as a rule granted where there has been delay, 33
- when granted before trial, 34
- against trespass, 114
- against nuisance, 202, 203
- against breach of covenant or agreement, 413—417
- need not be applied for before motion for judgment, 27
- order for, suspended for a certain time, 34

MANDATORY ORDER,

- for entry and inspection, 418
- ordered to be performed at cost of disobedient party, 601

MANOR. See *Lord of a Manor.***MANSION HOUSE,**

- pulling down, 50, 66

MANUFACTORY,

- meaning of, in Lands Clauses Act, 96

MANUFACTURE,

- within the meaning of the patent law, 255

MANUSCRIPTS,

- right of property in, 427
 - passes with transfer of subject, 430
 - to personal representatives of author, 431
- of an irreligious, seditious, or libellous character, 431
- injunctions to restrain the publication of, 428

MANUSCRIPTS—*continued.*

- what amounts to publication of, 429
- purchaser of, may alter as he thinks fit, 431
- copyright in, 290

MARKET,

- right to, 237, 238
- nuisance to, 239
- injunction against, 237

MARRIAGE,

- of infant, restrained by injunction, 541

MAYOR'S COURT,

- injunctions to restrain proceedings in the, 518, 519

MEADOW,

- breaking up a, 48, 463

MELIORATING WASTE, 38**METROPOLIS MANAGEMENT ACTS,** 111**METROPOLITAN BOARD OF WORKS,**

- restrained by injunction, 137
- injunction at suit of, 111

MICHAEL ANGELO TAYLOR'S ACT, 109

- powers of Commissioners of Sewers transferred to Common Council of City of London, 109 n.

MILL RACE,

- nuisance to a, 205

MINERALS. See *Mines, Mortgagee, Mortgagor, Ecclesiastical Persons, Support.*

- property in, 44, 45
 - wrongfully severed, 75
- reservation and exception of, 46, 170
- meaning of word, in a deed, 45
- damages for wrongfully working, 113
- estovers of, 46
- property of copyholder in, 47
- in copyholds, right of lord of manor to, 47

MINES,

- tenant for life may work open, 44, 45
 - may sink new shafts to work open, 45
 - may not open new, 44
- interest of copyholder for life or years in, 47
- right of copyholder of inheritance by custom in, 47
- right of customary tenant by custom in, 47

MINES—continued.

- as distinguished from quarries, 45
- grant of, 44, 45
- on estates of ecclesiastical persons, 64
- account of waste in, 76
- drowned mine, no right to support from, 164
- trespass on, 113, 115
- working, out of bounds, 113, 115
- account of trespass on, 112
- damages for trespass on, 113
- working, so as to let down surface, 166
- drainage of, 196
- barriers in, 113, 197

MINISTER,

- of a chapel, injunction to restrain a man improperly appointed, from acting as pastor, 458, 459
- of a chapel, improperly dismissed, injunction from hindering in the discharge of his office, 458
- injunction to restrain a, from preaching, 458

MISAPPLICATION,

- of corporate or other funds, restrained by injunction, 482, 509

MISREPRESENTATION. See *Fraud*.

MONIES,

- injunctions to restrain the payment, &c., of, 537
- payment of, into Court, on obtaining an injunction, 23, 570

MORTGAGEE,

- may in general pursue all his remedies concurrently, 462
- may, on a proper case being made out, be restrained from pursuing all his remedies concurrently, 462
- restrained from exercising power of sale, 462—464
 - from parting with surplus monies, 465
 - from presenting to a benefice, 465
 - from dealing with a ship in derogation of a charter-party, 465
- may not commit waste, if security be sufficient, 59
- may commit waste, if security be not sufficient, 59
- of burial ground may not commit waste, 65
- committing waste, pending redemption suit, 59
- injunctions at suit of equitable, 60, 466
- interest of, in lands taken under Lands Clauses Act, 98
- collateral advantage, 468

MORTGAGOR IN POSSESSION,

- may not commit waste, if security be insufficient, 60
- may not commit waste if bankrupt, *semble*, 60

MOTION,

- form of notice of, 556
- service of notice of, 554
- time for making, 557
- saving, 566
- hearing of, 563
- evidence on the, 557. See *Affidavits*.
- declaration of the rights of parties on the, 571
- for injunction treated as the trial of the action, 27, 570
- perpetual injunction may be granted, although no motion for inter-
locutory order, 27
- costs of motion, 572
- to advance the cause, 570
- to dissolve, 584
 - ex parte* injunctions, 586
 - who should move, 587
 - effect of delay, 588
- to discharge an irregular order, 588
- to commit for breach of injunction, 595
 - notice of, 595
 - form of, 596

MOTIVES,

- of instituting a suit sometimes regarded, 120, 479

MUSIC,

- as a nuisance restrained, 159

MUSICAL COMPOSITION,

- copyright in, 303—308
- what constitutes piracy of, 306, 307

NAME,

- assumption of, no injunction against, 544
- unauthorised use of, in advertisement, 545
- name of house, 545
- telegraphic address, 545

NAVIGABLE TIDAL RIVER,

- rights of Crown to soil of, 206, 207
- purpresture, 206
 - injunction to restrain, 206
- right of conservation, 207
- nuisance to public right of navigation, 206
 - injunctions against, 207
- fouling a, 207
- access to, 208, 209
- rights of riparian owner on banks of a, 208, 209

NAVIGATION,

- nuisance to, 206, 207
- right of, on inland waters is a right of way, 233

NEGOTIATION OF SECURITIES,

- injunctions against the, 536

NEWSPAPER,

- copyright in, 301

NOISE AND NOISY TRADES,

- actions for, when actionable nuisance, 158, 159
- injunctions to restrain, 159
- right to make a noise may be acquired by long user, 159

NOTES,

- copyright in, to a book, 291

NOTICE,

- before action not necessary, 573
- of injunction, 572
- of motion, 553
 - form of, 556
 - service of, 554
 - short notice, 553
 - effect of amendment on, 562
 - to commit, 595. See *Committal*.
- to treat under Lands Clauses Act, 91
 - served before expiration of compulsory power is sufficient, 99
- covenants enforced in equity against persons taking with, 405

NOVELTY,

- of an invention, proof of in patent action, 250

NUISANCE,

- what it is, 117
- may be public or private, 117
- diminution of value does not make an act a, 124
- who may sue to restrain, 119—122
- parties to action, 122
- threatened, 125
- increasing, 124, 139
- temporary, 123
- cesser of, after action brought, 125
- evidence of scientific witnesses as to, 124
- intention of defendant, when material, 125
- reasonable use of premises, no defence, 123
- arising from acts of several persons, 122
- purchaser, who has not accepted title, cannot sue, 126
- prescriptive right to cause nuisance, 159
- recurring, 123
- coming to a, 160

NUISANCE—*continued.*

- no time will legalise a public, 158, 235
- by private persons, principles on which the Court acts in restraining, 117, 123
- by public companies in the construction of their works, 126—132
- by public bodies, 133
 - principles on which Court interferes, 133
 - motives of suit not in general looked to, 120
 - effect of delay in coming to the Court, 138
- to dwelling-houses and houses of business, 140
 - standard of damage required by the Court as a condition of its interference by injunction, 140
 - who may sue, 141
- obstruction of light. *See Light.*
- pollution of air, 155—157. *See Air.*
- noise and noisy trades, 158
- interference with right of drain and drip, 160
- various nuisances, 157, 161
- prescriptive right to cause nuisance, 159
- to support, 163. *See Support.*
- relating to water, 178. *See Water.*
- to navigable tidal waters, 206. *See Navigable Tidal River.*
- to rights of way, 210. *See Way.*
- to ferries, 235
- to rights of market, 237
- to highways, 226. *See Highway.*
- nuisances connected with trade disputes, 241
- various nuisances to air and dwelling-houses, 157, 161

NUISANCES REMOVAL ACT,

- persons acting under, restrained by injunction, 137

OFFICE,

- injunction against a corporation improperly declaring an office void, &

ORCHARDS,

- waste in, 43

ORNAMENTAL TIMBER. *See Equitable Waste, Timber, Trees.*

PAINTINGS,

- copyright in, 311

PARENT AND CHILD,

- injunctions against parents with respect to custody and education of children, 542

PARK,

- waste in a, 43
- reclaiming deer, 44

PARLIAMENT,

- covenant not to oppose a bill in, 394
- no injunction in general to restrain a man from applying to, 9
- agreement not to apply to, may be enforced, 392
- injunction to restrain a company or corporation from applying funds in promoting or opposing bill in, 393, 484, 510

PARLIAMENTARY POWERS,

- to take land, nature of, 88
- persons having, may take what they deem necessary, if there be *bona fides*, 88—90

PARTICULARS,

- delivery of, in patent action, 250

PARTIES. See Attorney-General.

- application for injunction must be made by a party having sufficient interest, 551
- absence of, not material, if property be in danger, 552
- one suit cannot be maintained against several persons for distinct invasions of a right, 277
- misjoinder of, 122
- out of the jurisdiction, service of writ on, 551, 555

PARTING,

- with property, documents, &c., injunctions to restrain the, 444, 537

PARTNER,

- injunctions to restrain a man from holding out another as, 454
- may, in the absence of agreement, carry on business after dissolution, 338, 450
- restrained from carrying on business after dissolution contrary to agreement, 450
- who seeks equity must do equity, 454
- misconduct of, quarrels, &c., 453
- injunction granted though dissolution not prayed, 446
- right to use of name after dissolution or sale, 451, 452
- difference between receiver and injunction, 454

PARTNERSHIP,

- effect of appointment of a receiver of a, 454
- injunctions during or after dissolution of, 448
- injunction, though dissolution not sought, 446
- injunction to restrain a man from holding out that he is in, with another trader, 335, 454
- at will, injunction when granted, 448

PARTNERSHIP STYLE,

- fraudulent use of, 334, 335
- right to, after dissolution, 339, 451
- after decease of partner, 339, 452
- passes on the assignment of the business, 388, 452

PARTY WALL, 177

PASSING OFF. See *Trade Name*.

PASTURE,

breaking up a, 48, 463

PATENTS,

principles on which Court restrains infringement of, 246

who may sue, 247

who may be sued, 248

pleading, 250

evidence, 251

discovery, 253

delay and acquiescence, 254

what is an infringement, 255

intention immaterial, 255

infringement by manufacture, 255

by experiment, 256

by user, 256

by sale, 257

by repairs, 258

by taking part of an invention, 260

by aliens, 259

by licensee, 259

by workmen, 259

improvements, 259

colourable variations, 261

substitution of equivalents, 261

interlocutory injunctions against infringement, 262

principles on which granted, 262—265

practice on, 265

where defendant is willing to keep account, 265

delay is fatal, 265

undertaking as to damages, 266

evidence, 267

perpetual injunction against infringement, 268

where granted, 268

scope of, 270

enforcing obedience to, 271

costs, 272

stay of execution, 273

PAYMENT INTO COURT,

as a condition of granting an injunction, 23, 570

PENALTY. See *Forfeiture*.

as distinguished from liquidated damages, 386

no injunction, if sum named be liquidated damages, 386, 391

PENALTY—*continued*.

- if sum named be a, injunction to restrain breach of covenant is not excluded by payment, 386
- must be waived by persons who come to the Court for relief, 36, 279

PERIODICALS,

- copyright in articles contributed to, 300—302

PERMISSIVE WASTE, 38, 51**PERPETUAL INJUNCTION,**

- is in effect a decree, 590
- decreed, if an equitable case be shown, 25
- not granted till judgment in the action, 27
- granted, though not claimed by the writ of summons, 590
 - though no previous interlocutory application, 590
 - though mischief has ceased before trial, 590
- declaration of right instead of, 590
- plaintiff cannot be compelled to take damages in lieu of, 591
- principles on which granted, 25
- granted in general after establishment of legal right, 25
- not granted, if damage be small, 25
- acquiescence as a bar, 26
- postponed till after a certain period, 26, 135
- account as incident to, 27
- costs, 28

PHOTOGRAPHS,

- copyright in, 311

PICKETING, 242**PIG-STYE,**

- a nuisance, 157

PIRACY. See Copyright.**PISCARY,**

- drying up, 44

PLANS,

- if referred to, read along with agreement, 366
- mere exhibition of, not a warranty, 366

POOR LAW,

- injunctions relating to relief under, 512

POSSESSION,

- taken under Lands Clauses Act, 94
- no injunction against parties continuing in, 96, 108

PREFERENCE SHARES,

- injunctions against issuing, 489
- injunction at instance of holder of, 484

PRESCRIPTION ACT, 149

cases in which it does not apply, 150, 155, 158, 235

“interruption,” meaning of, 150

“enjoyment” of light under the Act, 150

PRESENTATION,

injunction to restrain, 418, 465

PRESUMPTION,

of grant, 146, 160, 199

PRINCIPAL AND AGENT,

principal bound by acquiescence of agent, 17

PRINTS,

copyright in, 308—311

piracy of, 308

no copyright in immoral, obscene, or libellous, 310

printed abroad, copyright in, 310, 321

PRIVACY,

loss of, by opening a window, 144

PROCEEDINGS,

pending in High Court, not restrained by injunction, 10

institution of proceedings may be restrained by injunction, 10

in inferior Courts may be restrained, 576—584

stay of,

no injunction to stay proceedings in High Court, 517

injunction to restrain institution of proceedings, 517

frivolous and vexatious actions, 517

proceedings against company in course of winding up, 528

concurrent administration actions, 520

proceedings in inferior Courts, 518

in foreign Courts, 520. *See Foreign Courts.*

pending appeal, 273

PROCESS,

meaning of, in reference to the patent law, 262

law as to a patent for a chemical, 262

PROMOTERS OF PUBLIC WORKS,

rights and liabilities of, 121—123

agreements of, with landowners, 551, 552

PROPERTY PENDENTE LITE. *See Protection of Legal Rights to Property Pending the Trial of the Right.*

PROSPECT,

shutting out a, 144

PROTECTION OF LEGAL RIGHTS, PENDING THE TRIAL OF THE RIGHT,

principles on which the Court formerly interfered, 576

PUBLICATION,

- of documents, papers, &c., in breach of confidence restrained by injunction, 427
- of lectures, restrained by injunction, 434
- of letters, restrained by injunction, 432
- of manuscripts, &c., restrained by injunction, 428, 431
- of proceedings pending before Court of justice restrained, 302, 346.
- no copyright at common law in a book, &c., after, 283
- what amounts to, 429
- public representation or performance of a dramatic piece, or musical representation, is a, 304

PUBLIC BODIES,

- injunctions against trespass by, 86
- injunctions against nuisance by, 133—137
- principles on which injunctions are granted against, 86, 133, 471, 509

PUBLIC HEALTH ACT,

- a local board interfering with rights of property in manner not authorised by, may be restrained by injunction, 110

PUBLIC WORKS,

- construction of, 104, 126—131
- lands injuriously affected by, 126—131

PURCHASER,

- in possession, restrained from committing waste, 61
- who has not accepted title cannot sue in respect of nuisance, 126

PURITY,

- of a natural stream, 185
- of an artificial watercourse, 193
- of a navigable tidal river, 207
- of air, 155

PURPRESTURE,

- what is a, 206
- as distinguished from nuisance, 206
- inquiry whether beneficial to the Crown that it should remain, 206
 - not where it is also a nuisance, 206
- injunction to restrain a, 206

QUARRY,

- as distinguished from a mine, 45
- tenant for life, &c., may work an open, 45
- interest of copyholder in a, 47
- estovers of a, 46

QUOTATION,

- when infringement of copyright, 293—295

RABBIT WARREN,
breaking up a, 44

RAILWAY CLAUSES CONSOLIDATION ACT, 102—109

limits of deviation, 102
notice of intention to exercise powers of deviation must be given, 103
landowner who seeks to restrain a company from deviation must show that he would be injured, 103
land may not be taken except for proper purposes of the Act, although within the limits of deviation, 104
interference with roads under the Act, 105
no injunction granted under s. 92 to compel railway company to allow plaintiff to run carriages on line, 106, 107
injunction granted under s. 115 to prevent engines being used on railway unless approved by the company, 107
injunction will also be granted to enforce provisions of s. 117...107
owner's rights after possession taken by company, 108
if purchase money not paid, landowner may enforce lien, and obtain appointment of receiver, 108

RAILWAY COMPANY. See *Railway Clauses Consolidation Act*.

restrained from carrying on business of coal merchant, 470
restrained from opening line without sanction of Board of Trade, 472
restrained from improperly applying its funds, 482—486
restrained from entering into contracts *ultra vires*, 486
restrained from doing improper acts, 486
restrained from issuing preference shares, 489
working agreements of, with another company, 489, 490
power of, to pass over another line, 105, 106
agreement of, as to passing over another line, 106
powers of, to effect a junction with another line, 107
right of, to exclude from station all persons except those using the railway, 109

RATE,
injunction against enforcing a, 548

RECEIVER,
in partnership cases, 454
of rents of land, 466
promoters of a company taking land in possession of a, 91
may have an injunction against waste by tenants for years, 62
effect of appointment of, 454
course of proceeding where, is sought to be restrained, 549

RECREATION,
ground dedicated to public, whether a nuisance, 244

REFERENCE TO CHAMBERS,
on granting an injunction, 153

REGATTA,
holding a, when a nuisance, 162

REGISTRATION. See *Copyright, Trade Mark.*

REMAINDER-MAN. See *Copyholder, Reversioner.*

- may not commit waste, 73
- may not join in waste for his own benefit, 74
- may have an injunction against waste by tenant for life, 35
- for life may have an injunction against waste, 55
- mesne, may have an injunction against waste, 55
 - but not an account, 78
- of equitable estate may have an injunction against waste, 55
- of part of the inheritance may have an injunction against waste, 56

RENEWABLE LEASES. See *Lessee, Tenant for Lives Renewable for Ever.*

REPAIRS. See *Estovers, Covenant, Forfeiture, Permissive Waste.*

REPORTS,

- of cases at law, copyright in, 291, 302
- of speech, 302

RESTRAINT OF TRADE,

- covenants in, 375 *et seq.*
 - total restraint, 375
 - partial restraint, 376
- construction and effect of, 378
- benefit of, passes with goodwill, 379
- restriction, when reasonable, 380
- divisibility of, 384
- measurement of distance, 384

REVERSIONER,

- may have an injunction against nuisance, 121
- may have an injunction against breach of covenant, 369
- bound, if right to light is acquired against lessee, 151

REVIEW,

- copyright in articles contributed to a, 300—302

RIFLE RANGE,

- a nuisance, 162

RIGHT OF WAY. See *Way.*

RIPARIAN PROPRIETORS,

- rights and liabilities of, 179 *et seq.*
- injunctions against, 200—204
- on banks of navigable tidal river, 208
- cannot grant their water-rights, apart from their estate in the land, 180

RIVER. See *Stream, Water, Watercourse.*

- rights of riparian proprietors in the bed of a, 178
- rights of riparian proprietors in the water of a, 179 *et seq.*

RIVER—*continued*.

- user of water of, for domestic purposes, 181
- user of water of, for manufacturing or agricultural purposes, 182
- banks of a, getting out of repair, 395
- navigable tidal, nuisance to a, 206
 - rights of Crown in a, 206
 - rights of proprietors on banks of, 208
 - rights of conservation, 207
 - powers of commissioners of sewers as to a, 208
 - private or exclusive right of fishery in a, 207

ROAD,

- public, interference with or obstruction of a, 105
- construction of railways over, 105
- substituted, 105

ROAD BOOKS,

- copyright in, 290
- piracy of, 296

RUNNING POWERS, 106, 107**SALE**,

- injunction to stay, 456, 533—536
- injunctions to stay exercise of power of, 462, 535
- injunction against, of real estate by voluntary settlor, 457
- injunction against, by sheriff of goods taken under *f. fa.*, 535
- injunction against, of cargo of a ship by the captain, 536
- of business, right to use of name, 452

SAND,

- copyholder of inheritance may by custom have a right to dig, for sale, 47

SAPLINGS,

- cutting, 71

SCANDAL,

- no injunction pending reference as to, 565

SCHOOL,

- converting premises to the purpose of a, 372

SCHOOL BOOKS,

- copyright in, 290
- piracy of, 296

SCHOOLMASTER,

- injunctions against removal of, 460

SCOTLAND,

- injunctions to restrain proceedings in, 522, 523, 525

SCULPTURES,

copyright in, 315

SEA-SHORE,

injunctions against removing part of the beach of the, 210
rights of the Crown in the, 206, 210
encroachment on the, 206
injunctions against obstructing access to the, 209
rights of public in, 210
nuisance to, 244

SEA-WALL,

liability to repair, 209

SECRETARY-AT-WAR,

restrained by injunction, 137

SECRETS,

of trade, injunctions against the disclosure of, 425
no injunction against disclosing, in absence of agreement, 425
secret information, injunction against use of, 426

SECURITIES,

injunction against the negotiation, assignment, &c., of, 536

SECURITY FOR COSTS, 563**SEEDS,**

sowing land with pernicious, 50

SEQUESTRATION,

writ of, for breach of injunction, 599, 600

SERVICE,

of writ of summons, 551
of notice of motion, 554
out of jurisdiction, 551, 555
of notice of injunction, 572
of order for injunction, 572
substituted, 572
affidavit of, 567
order for injunction made on, if defendant do not appear, 567
of notice of motion to commit, 596

SETTLED LAND ACT,

alteration in law of waste by, 79, 80
tenant for life restrained from mortgaging under, 467
from selling under, 536

SETTLOR,

waste by the, 66
voluntary, settlements may be enforced against, 457, 458

SEVERANCE,

rights to easements by. See *Easement*.

SEWERS,

- commissioners of,
 - injunctions against nuisances by, 137
 - power of, to determine whether an obstruction to an arm of the sea, &c., is justifiable, 208
 - powers of, to take houses, 109

SHAREHOLDER,

- injunctions at suit of, suing on behalf of himself and all other members of the company, against the company, 478, 481
- illegal suspension of, from his rights restrained, 477
- preference, injunction at instance of, 484

SHERIFF,

- injunctions against sale by, 535

SHINGLE,

- injunction to restrain removal of, from seashore, 210

SHIPPING LIST,

- copyright in, 290

SIDING TO A RAILWAY,

- obstructing a, 244

SKITTLE ALLEY,

- restrained as a nuisance, 159

SLANDER,

- injunction to restrain, 6
- on parliamentary candidate restrained, 443

SLANDER OF TITLE,

- injunctions against, 438
 - under sec. 32 of Patents Act, 1883...440

SMALL-POX HOSPITAL,

- not a nuisance, 198

SMOKE,

- injunctions against discharging, 156

SNOW,

- heaping up, 245

SOAP BOILING, 157**SOCIETY,**

- members of a, bound by the rules, 500
- no injunction against a, except in special cases, 500

SOIL. See Support.

- right to support for, 163
- in its natural state, 164

SOIL—*continued*.

- right to support for excavated, 164
 - incumbered with buildings, 165
 - arising by implication on severance, 165
 - may be waived by deed, 168
 - effect of clauses relating to minerals in the Railways Clauses Consolidation Act, 170—172
- subsidence caused by excavations of predecessor in title, 170

SOLICITOR,

- restrained from divulging confidential communications, 421
- restrained from acting as, 422
- restrained from renewing his certificate, 548

SOVEREIGN,

- no injunction to restrain a man from applying for a grant to a foreign, 7
- injunction at the suit of a foreign, 8

SOWING,

- with pernicious seeds, 50

SPECIAL DAMAGE,

- in cases of trespass, 87
- in cases of nuisance, 119
- in cases of the breach of a statute, 120, 473

SPECIAL TRIBUNALS,

- constituted for a special purpose, no equity to restrain proceedings in,
 - by a person entitled to do so, 519
- secus* where there is fraud, 520

SPECIFIC CHATTEL,

- enjoyment of, protected, 534

SPECIFIC PERFORMANCE,

- injunctions pending action for, 417
- injunctions against alienation pending action for, 417

SPIRITUAL CORPORATIONS,

- restrained by injunction, 515
- restraining statutes, 62, 63

SPIRITUAL COURTS. See *Ecclesiastical Courts*.**STABLE,**

- noise of, a nuisance, 159

STALLAGE,

- right of, 244

STATIONERS' HALL,

- entry at, 285
- certificate of, proof of copyright, 292

STATUTE. See *Companies*.

- rights arising under, are legal rights, 469
- action upon a, 470
- injunction to enforce a, 470, 473, 477, 478
- mandamus to enforce a, 472

STATUTORY REMEDY,

- whether it excludes remedy by injunction, 7, 8, 14

STAY OF PROCEEDINGS. See *Proceedings*.**STEAM ROLLER,**

- injury to pipes under highway, 245

STOCK,

- transfer of, restrained, 529

STONE,

- quarrying, 44—48

STOP ORDERS, 533**STREAM.** See *Water, Watercourse*.

- rights of riparian proprietors in a natural, 179—182
- source of a, and accessions to, 184
- flowing from underground, 185
- diversion of water from a, 183
 - injunction to restrain, 200
- fouling a, 185
 - injunction to restrain, 201
 - mandatory, 202, 203

STREET,

- altering level of, 226

SUBSIDENCE. See *Soil*.**SUBSTANTIAL DAMAGE,**

- in case of waste, 37, 38
- in cases of breach of statute, 85, 119, 134, 473
- to rights in water, 181, 183, 185, 201
- in cases of nuisance, 123, 140

SUPPORT. See *Soil*.

- right of,
 - for soil, 163, 164
 - by severance, 165, 166
 - in a mineral district, 169—175
 - may be qualified by deed or Act of Parliament, 167—174
- for buildings, may be acquired by prescription, 165
- mutual, between adjoining houses, 176
- for sewer, 175
- as between adjoining houses, 176

SUSPENSION OF ACTION,
effect on injunction, 589

SUSPENSION OF INJUNCTION,
injunction when suspended, 26, 570
where mandatory injunction granted, 34
pending appeal, 13, 24, 273, 570

TELEPHONE COMPANY,
overhead wires, 111

TENANT. See *Landlord and Tenant*.

TENANT BY THE CURTESY OR DOWER,
liable for waste at common law, 38

TENANT FOR LIFE. See *Estovers*.
liable for waste by Statute, 39
property of, in timber, &c., 39, 40, 75
may not fell timber, except for special purposes, 40, 42
may take estovers of timber, 42
may not open mines, 44
may work open mines, 44, 45
may work open limestone quarries, 45
may take estovers of minerals, clay, &c., 46
may cut turves for estovers, 46
in remainder may have an injunction, 55
power of, to cut timber under the Settled Land Act, 80

TENANT FOR LIFE WITHOUT IMPEACHMENT OF WASTE,
may not commit equitable waste, 66
pulling down mansion house, buildings, &c., 66, 67
cutting ornamental timber, 68, 75
trees planted for shelter, 68
may thin ornamental timber, &c., 70
may not cut young trees or saplings, 71
or underwood of insufficient growth, 71
may not derive an undue advantage from a power of sale or
exchange, 73
receiving price of growing timber on a sale, 74
may not commit waste by collusion, 73
may not authorise waste before his estate comes into possession,
73, 74
made subject to trustee of a term, 72
qualified by clause "except voluntary waste," &c., 71
settlor of the estate, 66
in remainder, 73
right of, to timber wrongfully severed, 75, 77
account against, for timber wrongfully severed, 76, 77

TENANT FOR LIVES RENEWABLE FOR EVER,

- may commit meliorating waste, 58
- may not commit equitable waste, 58

TENANT FOR YEARS,

- liable for waste by Statute, 39
- property of, in timber, &c., 39, 40
- may take estovers, 42, 46
- may work open mines, 44, 45
- without impeachment of waste, 72
- enjoyment of easement adverse to, 151

TENANT IN COMMON,

- injunction to restrain waste by, 56
- of a patent, may sue alone for an infringement, 248
- may sue alone for the piracy of a trade mark, 341
- pleading where account is sought, 352
- waste by, 77

TENANT IN FEE SUBJECT TO EXECUTORY DEVISE,

- not liable for legal waste, 58
- may not commit equitable waste, 58

TENANT IN TAIL,

- in possession, 56
 - dispunishable of waste, 56
 - infant, 56
- after possibility of issue extinct, 57
 - not liable for legal waste, 57
 - may not commit equitable waste, 57
- with reversion in the Crown, 57
 - dispunishable of waste, 57
- under Act of Parliament, which precludes the barring of the entail, 57
 - dispunishable of waste, 57
 - sometimes restrained from committing equitable waste, 57

TERM OF YEARS WITHOUT IMPEACHMENT OF WASTE,

- tenant for life of, 72
- trustees of, 72
 - tenant for life, subject to, 72

TERMS,

- imposed as a condition of granting or withholding an injunction, 22, 23, 569
- of order for injunction, 571

THAMES EMBANKMENT ACT, 111**THREATENED INJURY. See *Apprehended Injury*.**

THREATS ACTION,

injunction to restrain threats of legal proceedings for infringement,
440

TIMBER. See *Trees*.

what trees are, 39
property in growing, 39
rights of copyholder in, 41
rights of copyholder of inheritance by custom in, 41
waste in, 39—41
on ecclesiastical estates, 62—64, 76
property in, severed accidentally or wrongfully, 75, 78
cut under the direction of the Court, 75, 79
property in, severed on estate of infant, 56, 57
severed on lunatic's estate, 43
ornamental, what is to be considered, 68
property in, severed wrongfully, 78
power to cut, under Settled Land Act, 80

TIMBER ESTATES, 40**TITLE,**

of a book, right of author in the, 340
of a journal, name of editor not a necessary part of, 340
of copyright, 276

TOWING PATH,

injunction to restrain interference with use of, 233

TRADE,

fixtures set up for, 52, 80
covenants in restraint of, 375. See *Restraint of Trade*.
restraint as to space, 380
injunctions to restrain setting up a, 372 *et seq.*

TRADE DISPUTES,

nuisances connected with, restrained, 241—244
conspiracy, 241
intimidation and picketing, 242
defamatory circulars, 244

TRADE LIST,

copyright in, 290

TRADE MARK,

nature of a, 328
registration of, 330
must be registered, 329
restrictions on registration, 331
registration may be rectified, 332
title to a, 329
tenancy in common in, 341
right to, by assignment, 337

TRADE MARK—*continued*.

- right to, by devolution, 339
- right of author to title of his work as a, 339
- right to prevent the use of a, founded not on fraud, but on injury done to a right, 343, 351
- what constitutes piracy of a, 348—351
- injunctions to restrain piracy of a, 341 *et seq.*
 - pleading, 343
 - parties, 341, 342
 - delay and acquiescence, 347
 - discovery, 343
 - who may sue, 341
 - no, if there be misrepresentation, 344—347
 - extent of injunction, 342
 - form of injunction, 351
 - agents, &c., restrained, 342
 - account, 352
 - inquiry as to damages, 353
 - discovery for purposes of account or injury as to damages, 353
 - order for removal of trade mark, 355
 - costs, 354

TRADE NAME,

- fraudulent use of, 332—335
- of article, which has become descriptive, 335—337
- right to, passes on sale of business, 338
- of company calculated to deceive, 498

TRADE SECRET,

- no injunction in general not to divulge a, 424
- injunction not to divulge a, if there be duty or contract not to do so, 425, 426

TRADE UNION,

- injunction to restrain expulsion from, 504
- may be sued, 244

TRAMWAY,

- injunction against nuisance by, 245

TRANSFER,

- of property, documents, &c., injunctions to restrain the, 536—538
- of stock, injunction to restrain the, 529

TRANSLATION,

- copyright in, 299
 - of books published abroad, 299, 322
- of a book published in this country may be a piracy, 299

TREES. See *Timber*.

- other than timber, 39, 40
- exception of,

TREES—*continued.*

- ornamental, 68
- cutting young, comes within principle of equitable waste, 71
- property in dead, 40
- injury to, from discharge of noxious vapours, &c., 245

TRESPASS,

- in what cases of trespass an injunction formerly granted, 82
- effect of Judicature Act, 82
- principles on which the Court interferes, 84
- a continuing trespass, 84
- trespass by officials of the Crown, 85
- trespass by companies or bodies, incorporated by statute, 85, 86
 - principles on which the Court interferes, 85, 86
 - where a company steps out of the limits prescribed by statute, 86
 - no injunction to restrain a company in possession under a legal or equitable title from continuing in possession, 86
 - if the trespass affect the public interest the Attorney-General must sue, 87
 - private persons may sue, if specially injured, 87
 - in what cases the Attorney-General need not show damage to public, 87
- account as incident to injunctions against, 112
 - limited to six years before action, 112
 - exception, if there be fraud, 112
 - of minerals, charges, allowances, &c., 112
- enquiry as to damages, 113
- measure of damages, 113
- perpetual injunctions against, 116
- mandatory injunctions against, 114

TRIAL OF ACTION,

- expediting, after motion for injunction refused, 268, 570
- scientific evidence on, 124, 580
- early trial, 570

**TRIAL OF QUESTIONS ON WHICH RIGHT TO INJUNCTION
DEPENDS,**

- old procedure, 576
- mode of trial, 577

TRIVIAL,

- injunction not granted in trivial case, 6

TRUE AND FIRST INVENTOR, 251, 252

TRUSTEES,

- injunctions against, 456
- for public purposes, injunctions against misapplication of trust funds by, 458
 - who should sue, 459
 - parties to the suit, 459

TRUSTEES—*continued.*

- under trust deeds for religious bodies, injunctions against, 458
 - who should sue, 459
 - parties, 459
- under trust deeds for the purposes of education, injunctions against, 458
- of the fee, right and duty of, in respect to waste, 55
- for purchase, also tenants for life, 73
- of a term of years without impeachment of waste, 72
- to preserve contingent remainders, injunctions at suit of, 55
- disagreement between, 461

TURBARY, 46**TURNPIKE ROADS**,

- trustees of, restrained by injunctions, 137

UMPIRE,

- injunction restraining him from acting, 539

UNDERLESSEE,

- restrained from committing waste, 62

UNDERTAKING,

- with the Court has the effect of an injunction, 593
- as to damages, 23, 567
 - can be given by a married woman, 567
 - by Crown, 568
 - by company or corporation, 568
 - how given, 568
 - extent of, 569
 - breach of, 593
- Court cannot compel, 569
- remains in force, notwithstanding dismissal of action, 569
- enquiry as to damages, granted on, 591
- how enforced, 593

UNDERWOOD,

- right to cut, 40
- equitable waste in, 71

UNITY OF TITLE. See *Severance*.**UNPUBLISHED MATTER, MANUSCRIPTS, &c.,**

- rights of ownership in, 427
 - transfer of, 430
- of a seditious or libellous character, 431
- injunctions against publication of, 428

USER,

- which may be made of lands taken by a company under statutory powers, 474—477
- of an invention amounting to infringement, 256

UTILITY,

- of a patent, 251

VACANT LAND,

- nuisance on, liability of owner, 122

VEXATIOUS ACTIONS ACT, 1896,

- order under, restraining institution of proceedings, 518

VIADUCT,

- construction of a, 102

VOLUNTARY SETTLEMENT,

- of chattels or real estate binding on settlor, 457, 458
- injunction against defeating, 457
- a mere trust for payment of debts is not binding, 457

VOLUNTARY WASTE, 38**WARD,**

- intercourse with, restrained, 541, 542
- marriage with, restrained, 541

WARREN,

- waste in, 43

WASTE. See *Equitable Waste*.

- definition of, 37
- meliorating, 38
- voluntary or permissive, 38
- in what cases punishable at common law, 38
- in timber, trees, &c., 39, 40
 - what trees timber, 39
 - cutting underwood, when waste, 40
 - exception as to timber estates, 40
 - rights of copyholder in timber, 41
 - estovers, 42, 43
- in gardens, parks, &c., 43
- in walls of the sea or banks of rivers, 44
- in mines, clay, gravel, stone, &c., 44—46
 - estovers, 46
- in turves, 46
- mines, clay, gravel, &c., on copyhold land, 47, 48
- by alteration of property, 48
 - ploughing up meadow land, 48
 - converting arable land into wood, 48

WASTE—*continued.*

- by bad cultivation, 49
- in buildings, houses, &c., 50, 51
 - permissive waste, 51
 - removing fixtures, 52—54
- injunctions against, principles on which granted, 35—37
 - effect of delay, 36, 37
 - at suit of remainderman, 55
 - mesne remainderman, 56
 - remainderman for life, 55
 - trustees to preserve remainders, 55
 - by tenant in tail after possibility of issue extinct, 57
 - by tenant in fee with executory devise over, 58
 - by tenant under lease for lives perpetually renewable, 58
 - by coparceners, tenants in common, and joint tenants, 58
 - by copyholders, 58
 - by lord of manor, 58
 - by ecclesiastical persons, 62—65
 - by mortgagee in possession, 59
 - by mortgagor in possession, 60
 - if security be defective, 60
 - by purchaser in possession before payment of monies, 61
 - by other parties, 61
 - by collusion between parties, 73
 - account as incident to, 75—78
 - where injunction is not competent, 76
 - limits of, 77, 78
 - between tenants in common, 77
 - effect of delay on, 78
 - mesne remainderman, not entitled to, 78
 - damages for equitable, 78
 - perpetual injunction against, 79
- alteration in law of waste by Settled Land Act, 79, 80
 - by Agricultural Holdings Act, 80

WATER. *See River, Stream.*

- rights in running, 179 *et seq.*
- not flowing in a defined channel, 193
- subterraneous percolating, 194
- flowing from underground, 185
- in mines, 196
- surface, 193
- subterranean percolating water, 194
 - may be drained away from wells, 194
 - may not be polluted, 195
- drainage, 195
- diversion of, 185, 200
- flood, 196—198
- escape of, 197

WATER—*continued.*

- deed of grant of, 199
- implication of grant of, on severance, 199
- no implication of reservation of right to, on severance, 200
- new rights in, not connected with enjoyment of land, not to be created, 180, 199
- easements in, acquired by prescription, 185—190
 - alteration of mode of user of, 189
 - abandonment of, 190
- interruption of the acquisition of a prescriptive right to, 190
- injunction against cutting off supply of, to a house, 205

WATERCOURSE. See *River, Stream, Water.*

- definition of a, 193
- artificial, 190
 - rights and liabilities of parties in an, 190
- canal, 192
- drains and gutters, 160, 161
- implication of grant on severance, 199
- prescriptive rights in, 185, 186
- abstracting water from, 183
- fouling or obstructing, 185
 - injunctions against, 201
- entering upon land to repair a, 205

WATERWORKS COMPANY,

- restrained from cutting off supply of water, 205

WAY,

- modes of acquiring the right to, 211
 - grant, 211
 - limits of right when acquired by, 213
 - reservation, 217
 - prescription, 217
 - limits of right when acquired by, 219
- way of necessity, 221
 - direction of, 222
- right lost by abandonment, 223
- extinguishment and merger, 224
- injunction to restrain the obstruction of a, 210 225
- injunction against continuing to use a, 115
- deviation, right of, enforced by injunction, 217
- acquired by tenant against co-tenant, 218
- obstruction of private, by obstruction in public road, 225

WELL,

- owner of land may abstract water from his neighbour's, 194
- but may not pollute his neighbour's, 195

WHARF. See *Purpresture, Nuisance.*

- injunction against obstructing access to, 209

- WINDING-UP,
 petition for, injunction against, 544
 proceedings against company restrained after commencement of, 8, 528
- WINDOW. See *Air, Light*.
 opening a new, 145
 shutting out a pleasant prospect from a, 144
 erecting disagreeable objects in view of a, 144
 altering an old, 153
 agreement as to windows, 151
- WITHOUT IMPEACHMENT OF WASTE. See *Tenant for Life*
 Without Impeachment of Waste.
 effect of this clause, 65
- WOODED ESTATE, 40
- WOODS AND FORESTS,
 Commissioners of, injunctions against, 137, 415
- WORKS, PUBLIC,
 construction of, 126
 must be executed, *bond fide*, 126
 rule at law as to damage resulting, 128—131
- WRIT OF INJUNCTION,
 does not now issue, 1, 550

THE END.

Ex. A. G. P.
10/4/04.

HARVARD LAW SCHOOL LIBRARY

This book is due on or before the date stamped below. Books must be returned to the Circulation Desk from which they were borrowed. **Non-receipt of an overdue notice does not exempt the user from a fine.**

SEP 29 1996	





